TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 172

MARINE TRANSIT CORPORATION AND TUG "GERALD A. FAGAN," BY MARINE TRANSIT CORPORATION, CLAIMANT, PETITIONER,

vs.

LOUIS LOUIS DREYFUS AND CHARLES LOUIS DREYFUS, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 20, 1931

CERTIORARI GRANTED OCTOBER 12, 1931

(35,986)

(35,986)

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INDEX

	Original	Print
Record from district court of the United States, Southern New York	1	
Statement	1	
Libel	3	
Interrogatories to be propounded to the Diesel Tug Gerald A. Fagan to be answered under oath	11	
Interrogatories to be propounded to the Barge John E. Enright to be answered under oath	16	
Answer to libel	21	
Stipulation for value	25A	
Notice of motion to refer controversies to arbitration	25C	
Affidavit of Henry E. Otto read in support of motion for arbitration	25E	
Exhibit A—Contract of booking, dated August 7, 1928	25H	
Memorandum, Coxe, J., on motion for arbitration	25I	
Order granting motion for arbitration	26	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 22, 1931

	Page
Order resettling order as to arbitration	28
Case	30
Caption	30
Testimony of Richard J. Kaiser	31
J. McGowan	35
B. S. Oakley	49
Gerald A. Fagan	52
B. S. Oakley (recalled)	56
E. W. Holmes	57
Libellant's motion for judgment	62
Testimony of John D. Myton	63
Joseph J. Whalen	79
James Wentworth	90
John Hildebrandt	104
David F. Pickett	109
Captain Crossen, Jr	116
Roy Oatman	124
Respondent's summation	129
Libellant's summation	138
Exhibits:	
Louis Dreyfus & Company	
1—Contract between M. T. C. and L. D. & Co., August 17, 1928	147
2. Form of C. P. of N. Y. P. Exchange	149
3—Certificate showing quantity of grain loaded into barge "Edward A. Ryan"	157
4—Statement of claim	157
A and B—Loan receipt	158
Marine Transit	
B—Cargo certificate, September 13, 1928	162
C—Bill of lading, September 13, 1928	163
Award	166
Notice of motion to confirm award	167
Affidavit of Henry E. Otto to confirm award	169
Exhibit "A"—Order, dated September 6, 1929	172
Exhibit "B"—Award, dated December 20, 1929	174
Affidavit of Richard F. Lenahan	175
Affidavit of Gerald A. Fagan	181
Replying affidavit of Henry E. Otto	184
Copy of contract of New York Produce Exchange	191
Replying affidavit of A. C. Field	200
Replying affidavit of Fernand Leval	202
Replying affidavit of Herbert L. Bodman	205
Replying affidavit of Wilfred F. Rosar	208
Replying affidavit of Moses Cohen	210
Memorandum of Caffey, J., January 24, 1930	211
Memorandum confirming award	213
Order granting motion to confirm award	214

	Page
Order to show cause	216
Affidavit of Richard F. Lenahan	218
Affidavit of Henry E. Otto	221
Memorandum of Caffey, J., denying order to show cause	223
Order denying motion to restrain libellant from recovering from claimant or its stipulators on behalf of Tug Gerald A. Fagan	225
Notice of appeal	227
Assignments of error	229
Additional assignments of error	233
Order discontinuing action as to Barge "John Enright"	235
Stipulation as to exhibits	237
Stipulation as to record	238
Clerk's certificate	239
Proceedings in United States circuit court of appeals, second circuit	241
Opinion, Manton, J.	241
Decree	246
Clerk's certificate (omitted in printing)	247
Order allowing certiorari	

United States District Court,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, co-partners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,
Libellant-Appellee,

against

MARINE TRANSIT CORPORATION,
Respondent-Appellant,

Diesel Tug "GERALD A. FAGAN",
MARINE TRANSIT CORPORATION,
Claimant-Appellant,

and

Barge "JOHN E. ENRIGHT".

Statement.

Dec. 14, 1928.—Filed libel and stipulation.

Apr. 18, 1929.—Answer of Marine Transit filed.

Aug. 20, 1929.—Filed note of issue, Motion for Arbitration.

Aug. 27, 1929.—Motion granted only as to issues raised by contract between libellant and Marine Transit Co., COXE, *J.*

Aug. 28, 1929.—Order granting motion, COXE, *J.*

Sept. 6, 1929.—Order resettling order of Aug. 28.

Jan. 24, 1930.—Filed opinion, COFFEY, *J.*, in reproduction of minutes by stenographer.

4 *Statement.*

Feb. 3, 1930.—Filed opinion, CAFFEY, *J.*, motion to confirm award granted.

Feb. 8, 1930.—Filed final decree confirming award of Committee on Grain, $25,047.16.

Feb. 14, 1930.—Order to show cause why libellant should recover from G. A. Fagin.

Feb. 28, 1930.—Opinion 5770, CAFFEY, *J.* Motion denied to restrain libellant.

Mar. 6, 1930.—Notice and order allowing appeal (Caffey, J.)

5 Mar. 7, 1930.—Filed order denying motion.

Mar. 28, 1930.—Filed consent and discontinuance as to J. E. Enright.

May 7, 1930.—Filed assignments of error.

May 7, 1930.—Filed notice of appeal.

Oct. .., 1930.—Filed additional assignments of error.

6

Libel.

TO THE HONORABLE THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

The libel and complaint of LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners, doing business under the firm name and style of LOUIS DREYFUS & COMPANY

against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, its motors, equipment, etc., and the barge JOHN E. ENRIGHT, its tackle, apparel, gear, etc., in a cause of contract, collision and cargo damage, Civil and Maritime, alleges upon information and belief as follows:

FIRST: That at all the times hereinafter mentioned, libellants were and still are copartners doing business at No. 2 Broadway, City and State of New York, under the firm name and style of Louis Dreyfus & Company.

SECOND: That at all the times hereinafter mentioned the respondent, Marine Transit Corporation, was and still is a corporation organized and existing under and by virtue of the laws of the State of New York, having an office for the transaction of business at 17 Battery Place, Borough of Manhattan, City and State of New York, and has assets consisting of barges and Diesel tugs which are or will be during the pendency of process hereunder, within this district and the jurisdiction of this Honorable Court, and owns and/or charter and operate a number of such barges, of which the barge John E. Enright is one and Diesel tugs of which the Ger-

10 *Libel.*

ald A. Fagan is one, and by means of which it transported grain and other materials between the ports of Buffalo and New York City through the New York State Barge Canal.

THIRD: The Diesel tug Gerald A. Fagan is a tug of the motor type and at all the times hereinafter mentioned was used as a power unit in towing barges laden with grain and other materials from Buffalo and other ports along the New York State Barge Canal, to the port of New York and engaged in the transportation of merchandise for hire between such ports, among others.

11

FOURTH: The barge John E. Enright is a barge of the canal boat type engaged in the transportation of grain and other materials from the port of Buffalo and other ports along the New York State Barge Canal to the port of New York City but is without motive power of its own and is towed from one port to another.

FIFTH: The Diesel tug Gerald A. Fagan now is or will be during the pendency of process hereunder within the Southern District of New York and within the jurisdiction of this Honorable Court.

12

SIXTH: The barge John E. Enright now is or will be during the pendency of process hereunder within the Southern District of New York and within the jurisdiction of this Honorable Court.

SEVENTH: On or about September 13th, 1928 libellants shipped and placed on board the barge Edward A. Ryan at the port of Buffalo, 19,200 bushels of wheat in good order and condition, which wheat the respondent, Marine Transit Corporation,

agreed to carry on the said barge Edward A. Ryan to the port of New York and there deliver in like good order and condition as when shipped to the order of Bank of Nova Scotia, c/o Abell Forwarding Co., Inc., notify L. Dreyfus & Co., New York, New York, in consideration of an agreed freight then and there agreed to be paid to the respondent, Marine Transit Corporation, and in accordance with the valid terms of a certain booking contract, dated at New York, August 17th, 1928 and subject to the New York Produce Exchange Canal Grain Charter Party No. 1 as amended March 22nd, 1928, then and there executed and delivered to the said shipper by the said Marine Transit Corporation.

EIGHTH: Thereafter and on or about the said 13th day of September, 1928, the said Edward A. Ryan, having on board the aforesaid 19,200 bushels of wheat, left the port of Buffalo in tow of the Diesel tug Express for the port of New York via the New York State Barge Canal.

NINTH: That the said respondents did not deliver the aforesaid grain to libellants at the port of New York in like good order and condition as when received, but allowed and permitted said grain to be damaged in the following manner:

On or about September 25th, 1928 the Diesel tug Express with the barges Warren W. Clute, Frank, Vera M., Edward A. Ryan, George F. Barton and John E. Enright, in tow, was approaching the Federal Lock, Troy, New York with the barges two abreast, when about one-half mile west of the aforementioned lock, the said fleet was caused and permitted to ground at about 12:30 to 1 P. M. on the aforementioned day. The weather was good with clear visibility.

16 *Libel.*

The fleet was uncoupled and the Diesel tug Express took the barges Warren W. Clute, Frank and Vera M., in tow and continued eastbound, leaving the barges Edward A. Ryan, George F. Barton and John E. Enright, fast aground. Meantime the Diesel tug Gerald A. Fagan was dispatched west from Troy to float the barges Edward A. Ryan, George F. Barton and John E. Enright, which was done and the second fleet comprising the tug Gerald A. Fagan, barges Edward A. Ryan, John E. Enright and George F. Barton being towed in the order mentioned, started eastbound without survey or inspection, for the Troy Federal Lock. At this time the boats were coupled with lug lines only and the tug took the tier on short hawsers of about 25 to 30′ each in length. The barge John E. Enright was then down by the head. The tow continued eastbound in this order and upon approaching the Troy Federal Lock the tug in attempting to land the three boats, so carelessly and negligently maneuvered and operated as to cause the starboard corner forward of the Edward A. Ryan to graze the west concrete guard wall for a distance of about 10 to 15′ causing the bow of the headboat, the barge Edward A. Ryan, to come in forceful contact with the concrete corner recess of an outlet in the wall, subsequent to which the boat continued to graze along the wall and struck another recess just below the bulkhead, all of which caused considerable damage to the barge Edward A. Ryan, causing it to sink with its cargo of wheat in the west end of the Federal Lock chamber.

17

18

TENTH: That the aforesaid damage was not caused or contributed to in any way by the libellants or those for whom libellants were responsible.

ELEVENTH: That the aforesaid damage was caused solely through the fault, negligence and want of care of the respondents and those for whom the respondents are responsible in the following respects:

a. AS TO THE TUG GERALD A. FAGAN:

1. In that those in charge of the said tug were incompetent and inattentive to their duties.

2. In that the hook-up of the tier taken in tow of the tug was improperly made.

3. In towing a tier of three loaded grain barges on short hawsers.

4. In carelessly and negligently approaching the west concrete guard wall of the Troy Federal Lock.

5. In causing and permitting the barge Edward A. Ryan to strike the concrete wall.

6. Failure and inability to keep the tier in alignment behind the tug.

7. Failure to navigate with caution and care.

8. Failure to take into account the effect of a usual and well-known current.

9. In failing to have and maintain a proper and efficient lookout, and in other respects which will be pointed out at the trial.

22 *Libel.*

b. AS TO THE BARGE JOHN E. ENRIGHT.

1. By having and maintaining an incompetent master who was inattentive to his duties.

2. Failure to properly hook-up the lines between the headboat and the second barge, the John E. Enright.

3. Failure to steer properly and to follow the tug Gerald A. Fagan.

23 4. By allowing and permitting the barge Edward A. Ryan to strike the west concrete guard wall of the Troy lock.

5. Failure to take into account the effects of a usual and well known current.

6. Failure to navigate with caution and care and in other respects which will be pointed out at the trial.

TWELFTH: That by reason of the premises libellants have been damaged in the sum of Twenty Six Thousand ($26,000) Dollars, no part of which has
24 been paid although duly demanded.

THIRTEENTH: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE libellants pray that process in due form of law according to the course and practice of this Honorable Court in cases of Admiralty and Maritime Jurisdiction may issue against the said

Marine Transit Corporation, the Diesel Tug Gerald A. Fagan, its motors, equipment, etc., and the barge John E. Enright, its tackle, apparel, gear, etc., and that all persons having or claiming any interest therein be cited to appear and answer all and singular the matters aforesaid; that this Honorable Court be pleased to decree to your libellants their damages with interest and costs and that the Diesel Tug Gerald A. Fagan, its motors, equipment, etc., and the barge John E. Enright, its tackle, apparel, gear, etc., be condemned and sold to satisfy the same and that your libellants may have such other and further relief as in law and in justice it may be entitled to receive.

OTTO & LYON,
Proctors for Libellants,
60 Broad Sstreet,
New York City.

28 *Libel.*

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

L. STERN, being duly sworn, says:

I have read the foregoing libel and know the contents thereof and the same is true to the best of my knowledge, information and belief except such matters as are alleged on information and belief and as to those matters I believe it to be true; that the sources of my knowledge and information are reports and communications received and investigations made on behalf of the libellants.

29 The reason why this verification is not made by libellants is that libellants are copartners of a foreign partnership none of the partners being within this District or within the City of New York. Your deponent has a power of attorney to sign all necessary papers for the libellants.

L. STERN.

Sworn to before me this
11th day of December, 1928.

E. F. PLATOW,

30 Notary Public.

Queens Co. Clks. No. 2974, Reg. No. 3400
Kings Co. Clks. Nos. 135, Reg. No. 314
New York Co. Clks. No. 520, Reg. No. 0-951
Commission expires March 31, 1931

Interrogatories to Be Propounded to the Diesel Tug Gerald A. Fagan to Be Answered Under Oath.

1. Where and at what time did the tug Gerald A. Fagan first take in tow on the trip in question, the canal boats Edward A. Ryan, George F. Barton and John E. Enright.

2. Was this immediately after the said three boats had been aground about one-half mile west of Troy Federal Lock.

3. Was it the tug Gerald A. Fagan which dragged these three aforementioned barges off the place where they had been aground.

4. Was the tug Gerald A. Fagan assisted by any other tug; if so, which tug or tugs so assisted.

5. What assistance was rendered by John E. Matton & Sons' tug at the time of or before the tug Gerald A. Fagan arrived at the scene but after the tug Express had taken the barges Warren W. Clute, Frank and Vera M. away.

6. Did the barge Edward A. Ryan suffer any damage while aground or while being dragged off the bank. If so, state what it was.

7. Were any of the barges Edward A. Ryan, John E. Enright or George F. Barton surveyed or inspected at the time they were aground or shortly thereafter but before they were taken in tow by the tug Gerald A. Fagan.

8. Did the tug Gerald A. Fagan render any assistance in extricating the barges Warren W. Clute, Frank and Vera M.

34 *Interrogatories to Be Propounded to the Diesel Tug Gerald A. Fagan to Be Answered Under Oath.*

9. When and where did the Gerald A. Fagan, after leaving Troy westbound to take in tow the barges Edward A. Ryan, George F. Barton and John E. Enright pass the Diesel tug Express and her tow.

10. Did the Diesel tug Express have in tow at this time mentioned in the previous interrogatory, the barges Warren W. Clute, Frank and Vera M.

35 11. Did anyone for whom respondents herein would be responsible supervise the hook-up of the barges Edward A. Ryan, George F. Barton and John E. Enright after they were dragged off the bank, as set forth in Interrogatory #1.

12. How long were the hawsers between the tug Gerald A. Fagan and the headboat, the Edward A. Ryan.

13. Were the steering cables between the headboat Edward A. Ryan and the wheelboat John E. Enright in place and connected.

36 14. If your answer to the preceding interrogatory be in the negative, state where they were.

15. Were the lug lines between the barges taken up taunt.

16. If your answer to the preceding interrogatory be in the negative, explain just how the lug lines were rigged.

Interrogatories to Be Propounded to the Diesel Tug Gerald A. Fagan to Be Answered Under Oath. 37

17. How long did it take the tug Gerald A. Fagan with its consort aforementioned to go between the place where the boats were aground, as set forth in Interrogatory #1 and the Troy Federal Lock.

18. On which wall, stating whether the eastern concrete piers or the west guard wall, at Troy Federal Lock, did the tug attempt to land its tow.

19. When the tug Gerald A. Fagan was about 75′ from the jaws of the Troy Federal Lock at the northern end, what was the respective courses of 38

a. The tug, and

b. the tier of barges.

20. Did the headboat, Edward A. Ryan graze the west guard wall.

21. If your answer to the preceding interrogatory be in the affirmative, state exactly where:

a. The boat first contacted the wall, and

b. for what distance from the point indicated in answer to "a" did the boat continue to graze, and 39

c. did the starboard corner forward of the barge Edward A. Ryan strike the concrete corner of the first outlet or recess in that wall, and

d. If your answer to the preceding interrogatory be in the affirmative, did the boat continue grazing and strike another recess just below the bulkhead.

40 *Interrogatories to Be Propounded to the Diesel Tug Gerald A. Fagan to Be Answered Under Oath.*

22. What, if anything, did the tug Gerald A. Fagan do to prevent the headboat Edward A. Ryan coming in contact with the guard wall aforementioned.

23. Under what bell was the tug proceeding:

a. at the point about 75' west of the jaws of the western end of the lock,

b. at and just prior to the time the headboat struck the second recess, just below the
41 bulkhead.

24. What if any signals did the tug give the tier with respect to the contemplated approach of the lock.

25. If your answer to the preceding interrogatory states signals were given, were these signals acknowledged by the barges.

26. Was the deckhand on the tug Gerald A. Fagan, the member of the crew delegated to handle the lines and to act as lookout.

42

27. If your answer to the preceding interrogatory is in the affirmative, state where this member was just prior to and at the time of the first contact with the west guard wall at Troy Federal Lock.

28. Was the pool elevation of this lock normal at the time the barge Edward A. Ryan struck the wall.

Interrogatories to Be Propounded to the Diesel Tug Gerald A. Fagan to Be Answered Under Oath.

29. If your answer to the preceding interrogatory is in the negative, state the condition of the pool elevation at the aforementioned time.

30. Was the current in this level normal.

31. Did the barge Edward A. Ryan sink in the west end chamber of the Troy Federal Lock.

32. If your answer to the preceding interrogatory be in the affirmative, state with certainty the time of such sinking and the time it took the said barge to sink.

33. Describe the nature of the damage suffered by the barge Edward A. Ryan.

34. State the time the tug Gerald A. Fagan, the barge John E. Enright and George F. Barton left the Troy lock.

35. Attach a copy of the report of the accident made to the canal authorities, if one were made.

36. Give a complete itinerary stating the exact time of the movements of the Gerald A. Fagan between the time it left Troy, west bound, up to and including the time it left the Troy Federal Lock, eastbound, with the barges George F. Barton and John E. Enright in tow.

37. Did Marine Transit Corporation own and/or charter and operate the tug Gerald A. Fagan on the trip in question.

46 **Interrogatories to Be Propounded to the Barge John E. Enright to Be Answered Under Oath.**

1. Was the barge John E. Enright one of six boats that left Buffalo in tow of the Diesel tug Express on or about September 13th, 1928?

2. Did the John E. Enright, coupled to five other boats on the trip in question, ground about one-half mile west of Troy Federal Lock, opposite or near O'Shaunessy's Ice House?

47 3. If your answer to the preceding interrogatory be in the affirmative, explain the position in which these boats were lying at the time of the grounding.

4. Was the tier uncoupled for any reason?

5. Did the Diesel tug Express attempt to remove the entire consort?

6. Was it successful?

7. Did it succeed in dragging the barges Warren W. Clute, Frank and Vera M. off the bottom?

48 8. If your answer to the preceding interrogatory be in the affirmative state exactly when the boats were dragged off.

9. Did the tug Gerald A. Fagan assist in extricating the three barges aforementioned?

10. When did the Diesel tug Express with the three boats aforementioned leave the barges Edward A. Ryan, George F. Barton and John E. Enright?

Interrogatories to Be Propounded to the Barge John E. Enright to Be Answered Under Oath.

49

11. Were the barges Edward A. Ryan, George F. Barton and John E. Enright then still aground?

12. Where was the Diesel tug Gerald A. Fagan at this time?

13. When did the Diesel tug Gerald A. Fagan arrive to assist the barges Edward A. Ryan, George E. Barton and John E. Enright?

14. Did the Diesel tug Gerald A. Fagan subsequently drag off from the bank the barges Edward A. Ryan, George F. Barton and John E. Enright?

50

15. If your answer to the preceding interrogatory be in the affirmative, exactly when were the boats dragged off the bank?

16. Were the three barges, Edward A. Ryan, George F. Barton and John E. Enright then taken in tow by the Diesel tug Gerald A. Fagan? If so, give the order in which they were towed.

17. Did the tug Gerald A. Fagan's personnel supervise the hook-up of the tier of barges?

51

18. Were any steering cables in place and in use between the time the boats were aground about one-half mile west of Troy Federal lock, as set forth in interrogatory No. 2, up to and including the time the barge Edward A. Ryan struck the west guard wall?

19. If your answer to the preceding interrogatory be in the negative, state where the steering cables were.

52 *Interrogatories to Be Propounded to the Barge John E. Enright to Be Answered Under Oath.*

20. If your answer to interrogatory No. 18 be in the negative, was any complaint lodged by the captain of the Edward A. Ryan with respect to the absence of steering cables?

21. What was the length of the hawsers on which the tug Gerald A. Fagan took the tier of barges?

22. Was any steering done from the barges between the time they were aground one-half mile
53 west of Troy Federal Lock, as set forth in interrogatory No. 2, and the time the Edward A. Ryan struck the west guard wall?

23. Were any of the boats, Edward A. Ryan, George F. Barton and John E. Enright sounded, inspected or surveyed at all immediately after the time they grounded about one-half mile west of Troy Federal Lock, as set forth in interrogatory No. 2?

24. If your answer to the preceding interrogatory be in the affirmative, in any respect, state:

54 a. What if any damage was found?

b. What if any water any of the barges were making?

c. What attempt was made to keep the water at a minimum?

25. Was the barge John E. Enright down at the head on the trip from the point where the boats had grounded about one-half mile west of Troy Lock, as set forth in interrogatory No. 2 and the west guard wall of the Troy Federal Lock?

Interrogatories to Be Propounded to the Barge John E. Enright to Be Answered Under Oath. 55

26. On what wall of the Troy Federal Lock did the tug attempt to land the tier of barges?

27. What if any signals were given by the tug with respect to this contemplated landing?

28. What if any signals were given by the barges with respect to this landing?

29. When the tug was about 75 feet away from the jaws of the lock at the north end, what were the courses of 56

a. The tug, and

b. the tier of barges?

30. Were the lug lines between the barges taken up tight?

31. If answer to preceding interrogatory be in the negative, state just how they were rigged.

32. Did the quick water from the tug affect the movement of the barges?

57

33. Explain in detail the manner in which the tug attempted to land the barges at the guard wall or concrete piers at the north end of the Troy Federal Lock.

34. Did the starboard corner forward of the Edward A. Ryan graze the west concrete guard wall of the Federal Lock? If so, for how long before it struck the first outlet?

58 *Interrogatories to Be Propounded to the Barge John E. Enright to Be Answered Under Oath.*

35. After striking the first outlet, did the boat continue to graze and strike a recess just below the bulkhead?

36. State exactly the time of day and date the barge Edward A. Ryan struck the west guard wall at Troy Federal Lock.

37. Describe the nature of the damage suffered by the barge Edward A. Ryan.

59

38. How long after the barge Edward A. Ryan struck the wall did it sink?

39. State the time the Diesel tug Gerald A. Fagan and the barges John E. Enright and George F. Barton left the Federal Lock eastbound after the barge Edward A. Ryan sank.

40. Was the barge John E. Enright owned and/or chartered by the Marine Transit Corporation on the trip in question?

60

Answer to Libel.

61

TO THE HONORABLE THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

The answer of the Marine Transit Corporation, as respondent and as claimant of the diesel tug "Gerald A. Fagan" to the libel and complaint of Louis Dreyfus, et al., respectfully alleges:

FIRST: Denies any knowledge or information sufficient to form a belief as to the allegations contained in the paragraph of the libel marked First.

62

SECOND: On information and belief admits that the libellant shipped on board the barge "Edward A. Ryan" on or about September 13th, 1928 a cargo of wheat, the quantity and condition of which is unknown to the respondent and claimant herein, and for the true terms of the contract of carriage the claimant begs leave to refer to the original contract, which will be produced on the trial of this action; except as so admitted denies the remaining allegations contained in the paragraph of the libel marked Seventh.

THIRD: On information and belief denies the allegations contained in the paragraph of the libel marked Ninth except as the same may hereinafter be admitted or modified.

63

FOURTH: Denies any knowledge or information sufficient to form a belief as to the allegations contained in the paragraph of the libel marked Tenth.

FIFTH: On information and belief denies the allegations contained in the paragraph of the libel marked Eleventh.

64 *Answer to Libel.*

SIXTH: Denies any knowledge or information sufficient to form a belief as to the allegations contained in the paragraph of the libel marked Twelfth, except it admits no part of the sum demanded has been paid.

SEVENTH: Admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court but denies all and singular the premises are true as alleged in the paragraph of the libel marked Thirteenth.

65 FURTHER ANSWERING THE RESPONDENT-CLAIMANT ALLEGES:

EIGHTH: That in the month of September, 1928 the respondent undertook to transport for the libellant a cargo of grain aboard the barge "Edward A. Ryan" from the Port of Buffalo to the Port of New York. That previous to the loading of the said barge respondent used due diligence to make the said vessel seaworthy and she was inspected and passed as seaworthy by the libellant herein; that the barge "Edward A. Ryan" was without motive power and that the respondent furnished the power
66 for towing the said barge, along with several other barges, all of which were properly manned and equipped and in all respects seaworthy for navigation and the towing unit furnished was also seaworthy and properly manned and equipped. In accordance with the custom of navigation on the canal the said barge "Edward A. Ryan" and the other barges with her were towed by the diesel boat "Express" from Buffalo to Troy where they were turned over to the claimant's tug "Gerald A. Fagan" for completion of the voyage to New York; that the

diesel tug "Gerald A. Fagan" at the time was in seaworthy condition, properly manned and equipped and the respondent herein had used due diligence to make her so.

NINTH: That any damage sustained by libellant is not recoverable from the respondent or claimant of the steamtug "Gerald A. Fagan", as said claimant had used due diligence to make all the vessels seaworthy at the time of the commencement of the voyage and the respondent-claimant is entitled to the benefit of the United States Statute, commonly known as the Harter Act. 68

FURTHER ANSWERING CLAIMANT ALLEGES:

TENTH: That on September 25th, 1928 at about 4:00 p. m. the barges "Edward A. Ryan", "John E. Enright" and "George F. Barton" were taken in tow by the steamtug "Gerald A. Fagan" a short distance above the U. S. Government lock at Troy, N. Y. The barges were arranged in tandem fashion and the "Gerald A. Fagan" took the boats in tow in the usual customary manner on two short hawsers. She then proceeded to tow the vessels to the Government lock at Troy. The tug entered the lock in the customary and usual fashion and the barges were following behind the tug when suddenly without any warning the barge "Edward A. Ryan" took a sheer to starboard towards the lock wall. At the time the tug "Fagan" was proceeding under one bell and the master immediately rang for full speed in order to prevent the sheer but before the engines were put full speed the barge struck the lock wall. At the point where she struck the lock wall there is a sluiceway and the only 69

70 *Answer to Libel.*

means for accounting for the sheer is that some unexpected current not discernible to the master of the tug caused the barge to get out of control and same happened without any fault or negligence on the part of the tug "Gerald A. Fagan" and those in charge thereof.

ELEVENTH: All and singular the premises are true.

WHEREFORE, respondent-claimant prays that the libel be dismissed with costs.

71

MACKLIN, BROWN, LENAHAN & SPEER,
Proctors for Respondent-Claimant,
Office & P. O. Address,
44 Beaver Street,
Borough of Manhattan,
City of New York.

72

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

GERALD A. FAGAN, being duly sworn, deposes and says, that he is Treasurer of the MARINE TRANSIT CORPORATION, respondent-claimant in this action; that he has read the foregoing Answer to Libel and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. That the reason this verification is made 74
by deponent and not by respondent-claimant is that the respondent-claimant is a corporation and deponent is an officer thereof; that the sources of deponent's knowledge and the grounds of his belief as to the matters and things therein stated to be alleged, on information and belief are had from the regular course of his duties as such officer.

GERALD A. FAGAN.

Sworn to before me this
16th day of April, 1929.

SHIRLEY GEIER,
Notary Public. 75

Stipulation for Value. 73

(Seal of Continental Casualty Co.)

THE CONTINENTAL CASUALTY COMPANY
General Offices: Chicago

H. G. B. ALEXANDER
President

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

STIPULATION FOR VALUE 74

Entered into Pursuant to the Rules and Practice of this Court.

WHEREAS, a Libel was filed on the day of by DREYFUSS & COMPANY, as Owner of cargo lately laden on barge "EDWARD A. RYAN", against MARINE TRANSIT CORPORATION, as Owner of tug "GERALD A. FAGAN", for the reasons and causes in said libel mentioned;

AND WHEREAS, a claim to said vessel has been filed by MARINE TRANSIT CORPORATION and the value thereof has been fixed by stipulation at the sum of TWENTY-SIX THOUSAND AND 00/100 ($26,000.00) DOLLARS, for the purpose of bonding, and the parties hereto consenting and agreeing that if the Libellant, recover, the decree may be entered against them and each of them for an amount not exceeding the above agreed amount with interest thereon from this date, together with all costs of this action not exceeding TWO HUNDRED FIFTY AND 00/100 ($250.00), and that thereupon execution therefor may issue against their and each 75

73 *Stipulation for Value.*

of their goods, chattels, lands and tenements or other real estate.

NOW, THEREFORE, the condition of this stipulation is such, that if the claimant herein and the CONTINENTAL CASUALTY COMPANY of Hammond, Indiana with an office and usual place of business at #75 Fulton Street, New York, N. Y., the stipulator undersigned, shall abide by all orders of the Court interlocutory or final, and pay the amount awarded by the final decree rendered by this Court, and by any Appellate Court if an appeal intervene, with
74 interest as aforesaid, then this stipulation to be void; otherwise to remain in full force and virtue.

MARINE TRANSIT CORP.
GERALD A. FAGAN
Secy.-Treas.

CONTINENTAL CASUALTY COMPANY
By GILBERT WARNER
Attorney-in-fact.

By M. L. CROTTY
(Seal) Attorney-in-fact.

75

Taken and acknowledged this day of
before me.

(Seal) Notary Public

Notice of Motion to Refer Controversies to Arbitration. 73

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, co-partners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, its motors, equipment, etc., and the barge JOHN E. ENRIGHT, its tackle, apparel, gear, etc. 74

SIRS:

PLEASE TAKE NOTICE that upon the pleadings and proceedings had herein and upon the annexed affidavit of Henry E. Otto sworn to on the 19th day of August, 1929, together with the exhibit attached to the said affidavit, we shall move this Court at a term thereof to be held for the hearing of motions in the Post Office Building, Borough of Manhattan, City of New York on the 27th day of August, 1929 at 10:30 o'clock A. M. on that day or as soon thereafter as counsel can be heard for an order referring the dispute between the libellants and the Marine Transit Corporation and the tug Gerald A. Fagan and barge John E. Enright to the Committee on Grain of the New York Produce Exchange and for 75

73 *Notice of Motion to Refer Controversies to Arbitration.*

such other and further relief in the premises as to the Court may seem just and proper,

Dated, New York, August 19, 1929.

Yours, etc.,

OTTO & LYON,
Proctors for Libellant,
60 Broad Street,
New York, N. Y.

74

To:

MACKLIN, BROWN, LENAHAN & SPEER, Esqs.,
Proctors for Marine Transit Corporation,
Claimant for tug Gerald A. Fagan,
44 Beaver Street,
New York, N. Y.

THOMAS A. MCDONALD, Esq.,
Proctor for Claimant barge John E. Enright,
15 William Street,
New York, N. Y.

75

Affidavit of Henry E. Otto, Read in Support of Motion for Arbitration. 73

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, co-partners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, its motors, equipment, etc., and the barge JOHN E. ENRIGHT, its tackle, apparel, gear, etc. 74

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

HENRY E. OTTO, being duly sworn, says: That he is one of the proctors for the libellants and is familiar with all proceedings heretofore had in the above matter. 75

On August 17, 1928, at New York City libellant and the respondent Marine Transit Corporation entered into a contract of booking, a copy of which is attached hereto and marked Exhibit A. According to the said contract of booking, the Marine Transit Corporation was to transport about 200,000 bushels of wheat for the libellants from Buffalo to New York City between September 1st and September 15th, 1928. The said booking contract by its

73 *Affidavit of Henry E. Otto.*

terms was subject to the New York Produce Exchange Canal Grain Charter Party No. 1 as amended. The said New York Produce Exchange Canal Grain Charter Party No. 1 as amended provided among other things the following:

> DISPUTES: All disputes arising under this contract to be arbitrated before the Committee on Grain of the New York Produce Exchange whose decision shall be final and binding.

Pursuant to the aforesaid booking contract the
74 libellant shipped approximately 19,200 bushels of wheat from Buffalo on the barge Edward A. Ryan. Upon information and belief the said barge Edward A. Ryan and John E. Enright were chartered by the owners to the Marine Transit Corporation on a per diem basis and the Marine Transit Corporation became in law the owner pro hac vice of the said barges. The tug Gerald A. Fagan was the towing vessel. The said tug was owned by the respondent Marine Transit Corporation. The barge Edward A. Ryan while in tow of the tug Gerald A. Fagan was caused, allowed and permitted to sink in the Federal Lock at Troy, New York,
75 through negligence and want of care. Libellants caused a libel to be filed on December 14, 1928, and have obtained stipulation for value covering the tug Gerald A. Fagan. Issue was joined on April 17, 1929.

Due demand that the disputes involved in this litigation be arbitrated in accordance with the contract as hereinabove set forth was made on proctors for the claimant respondent Marine Transit Corporation. The proctors have refused to submit the controversies involved herein to arbitration.

The result of this arbitration is subject to the jurisdiction of this Court and does not divest this Court of jurisdiction of matters and things involved herein.

Wherefore deponent respectfully requests that an order be entered herein referring the dispute between the libellants and the Marine Transit Corporation and the tug Gerald A. Fagan and the barge John E. Enright to the Committee on Grain of the New York Produce Exchange.

HENRY E. OTTO.

Sworn to before me this
19th day of August, 1929.

WILLIAM H. CRAWFORD,
Notary Public, Kings County.
N. Y. Co. Clk.'s No. 237, et al.
Commission expires March 30, 1930.

73 **Exhibit A.**

MARINE TRANSIT CORPORATION
17 Battery Place
New York City

August 17, 1928

WE HAVE THIS DAY CONFIRMED BOOKING, CANAL FREIGHT:

BETWEEN: Marine Transit Corporation, Owners or Agents

AND: Louis Dreyfus & Company, Charterers.

74 THAT the said Owners or Agents will furnish insurable Canal Tonnage, for grain, as below:

QUANTITY: Two fleets, about 200,000 bushels wheat

PORT OF LOADING: Buffalo, N. Y.

DATE OF LOADING: September 1/15, 1928.

DESTINATION: New York, N. Y.

RATE: 6¼ cents per Bushels, NET TO BOATS

INSURANCE: CARGO AND FREIGHT, to be placed by and for account of Charterers, Carriers Liability to
75 be placed by and for account of Owners or Agents.

OTHER TERMS: Subject to New York Produce Exchange Canal Grain Charter Party No. 1 as amended.

MARINE TRANSIT CORPORATION,
Owners or Agents
(Signed) GERALD A. FAGAN

LOUIS DREYFUS & COMPANY
Charterers
(Signed) J. G. BENNETT

Memorandum of Judge Coxe. 73

ENDORSED ON MOTION PAPERS.

"Motion granted only as to the issues raised by the contract between the libellants and the Marine Transit Corporation. Settle Order on Notice."

ALFRED C. COXE,
U. S. D. J.

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76 **Order, Dated August 28, 1929.**

At a Stated Term of the United States District Court, held in and for the Southern District of New York at the Court Rooms of said Court in the United States Court & Post Office Building, in the Borough of Manhattan, City of New York, on the 28th day of August, 1929.

Present—Honorable ALFRED C. COXE, *U. S. D. J.*

77 LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, co-partners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, its motors, equipment, etc., and the barge JOHN E. ENRIGHT, its tackle, apparel, gear, etc.

78 Libellants having made a motion for an order referring the dispute between the respective parties to the Committee on Grain of the New York Produce Exchange and said motion having duly come on to be heard at a Stated Term of this Court for the hearing of motions and after hearing Henry E. Otto, of counsel for libellants in support of said motion and E. L. Lamb, of counsel for Marine Transit Corporation and the tug Gerald A. Fagan and Thomas A. McDonald, of counsel for the barge John E. Enright both in opposition thereto and due

deliberation having been had, on motion of Otto & Lyon, proctors for libellants, it is

ORDERED that the said motion be and the same hereby is granted in so far as it affects the Marine Transit Corporation, and it is

FURTHER ORDERED that Marine Transit Corporation submit to arbitration before the Committee on Grain of the New York Produce Exchange any and all disputes and controversies under the contract dated August 17th, 1928 between Marine Transit Corporation and Louis Dreyfus & Company for the transportation of 200,000 bushels of wheat from Buffalo to New York.

ALFRED C. COXE,
U. S. D. J.

82 **Order Resettling Order of August 28, 1929.**

At a Stated Term of the United States District Court held in and for the Southern District of New York at the Court Rooms of said Court in the United States Court & Post Office Building, in the Borough of Manhattan, City of New York on the 6th day of Sept. 1929.

Present—Honorable ALFRED C. COXE, *U. S. D. J.*

83

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, co-partners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, its motors, equipment, etc., and the barge JOHN E. ENRIGHT, its tackle, apparel, gear, etc.

84

Upon the annexed consents and on motion of Otto & Lyon, proctors for the libellants, it is

ORDERED that the order entered herein on the 28th day of August, 1929 be resettled and amended to read as follows:

ORDERED that the said motion be and the same hereby is granted only as to the issues raised by the contract between the libellants and the Marine Transit Corporation

and it is

FURTHER ORDERED that Marine Transit Corporation submit to arbitration before the Committee on Grain of the New York Produce Exchange any and all issues under the contract dated August 17th, 1928 between the Marine Transit Corporation and Louis Dreyfus & Company for the transportation of 200,000 bushels of wheat from Buffalo to New York.

ALFRED C. COXE,
U. S. D. J.

We hereby consent to the entry of the foregoing order and waive notice of settlement.

MACKLIN, BROWN, LENAHAN & SPEER,
Proctors for Marine Transit Corp.

THOMAS A. McDONALD,
Proctor for the Barge John E. Enright.

88 **Case.**

LOUIS DREYFUS & COMPANY

and

MARINE TRANSIT CORPORATION.

October 4, 1929.

Arbitration before the Committee on Grain, of the New York Produce Exchange, pursuant to the
89 attached order.

Present: GRAIN COMMITTEE,

Messrs. A. C. Field, Chairman;
James O'Donohoe,
C. N. Hitchcock,
James H. Bowne,
Walter Trappe.

Messrs. OTTO & LYON,
(Mr. Otto) for Louis Dreyfus & Company.

Messrs. MACKLIN, BROWN, LENAHAN & SPEER,
90 (Mr. Lenahan) for the Marine Transit Corporation.

Adjourned to December 11, 1929.

Richard J. Kaiser. Called by Libellant. Direct. 91

Met pursuant to adjournment, December 11, 1929.

RICHARD J. KAISER, being duly sworn and examined as a witness on behalf of Louis Dreyfus & Company, testified as follows:

BY MR. OTTO:

Q. By whom are you employed? A. Louis Dreyfus & Company.

Q. Are you familiar with the shipment of grain, ex barge Edward A. Ryan, Buffalo, New York? A. 92
Yes.

Q. I hand you a contract between the Marine Transit Corporation and Louis Dreyfus & Company, and ask whether that is the original contract dated August 17, 1928, entered into between the Marine Transit Corporation and Louis Dreyfus & Company? A. It is.

Mr. Otto: I offer the contract in evidence. It is marked Dreyfus Exhibit 1.

Q. Is this a printed form of the charter party of the New York Produce Exchange (handing wit- 93
ness paper), to which this booking contract refers? A. It is.

Mr. Otto: I offer it in evidence.
It is marked Dreyfus Exhibit 2.

Q. Is this a certificate (handing witness paper) showing quantity of grain loaded into the barge Edward A. Ryan? A. Yes.

94 *Richard J. Kaiser. Called by Libellant. Direct.*

Mr. Otto: I offer it in evidence.

It is marked Dreyfus Exhibit 3.

Q. Did Louis Dreyfus & Company deliver to the Marine Transit Corporation a shipment of 19,200 bushels of No. 4 Manitoba wheat, on September 13, 1928? A. They did.

Q. Did Louis Dreyfus & Company receive any part of this grain at any time? A. No.

Q. Are you familiar with the market value of grain of this kind? A. I am.

95 Q. Can you state what the market value of this grain at New York, on September 25, 1928, was? A. 1.19⅞.

Q. Is this a statement of your damages (handing witness paper), as you understand them to be? A. It is.

Mr. Otto: I offer the statement of damages in evidence.

It is marked Dreyfus Exhibit 4.

The Chairman: Do I understand Louis Dreyfus & Company did not receive any part of this shipment of grain at any time?

The Witness: They did not.

96 Mr. Lenahan: You are not the gentleman who signed the contract in behalf of Louis Dreyfus & Company, are you?

The Witness: No, sir.

Mr. Lenahan: Did you handle the collection of these claims of Louis Dreyfus & Company for damaged cargoes?

The Witness: It is usually handled by the bookkeeping department.

Mr. Lenahan: What I mean is, you had the cargo insured, did you not?

The Witness: Yes, Louis Dreyfus & Company.

Mr. Lenahan: You have been paid, haven't you?

The Witness: No, we have not been paid.

Mr. Lenahan: You have had an advance.

The Witness: We received a loan.

Mr. Lenahan: Have you got the loan receipt?

The Witness: Yes.

Mr. Lenahan: Can you produce that receipt?

Mr. Otto: The contract provides both parties 98
insure—carrier's insure their liability, and the shipper insures the cargo. I do not see that it is relevant, but if you want them I will be glad to present them.

The Chairman: If it is not an insurance matter, what is the controversy?

Mr. Otto: The controversy is this, that the grain was delivered to a carrier in Buffalo for delivery in New York. The grain shipper, Louis Dreyfus & Company, did not receive any of the grain. They have insurance against cargo lost. The carrier has insurance against carrier's liability. Louis Dreyfus & Company 99
presented a claim to the underwriters, in normal course, and they advanced to Louis Dreyfus & Company an amount, as a loan, the same to be paid out of this recovery. Therefore, I do not see how it affects the situation in any way. The rights under the contract, whether Louis Dreyfus & Company or the underwriters, are the same. Dreyfus & Company has not been paid. Mr. Kaiser has so testified.

Mr. Lenahan: That is only a subterfuge. Let's have the loan receipt.

The Chairman: It seems to me your controversy is on the value of this grain.

Mr. Otto: The amount of the loss, yes.

Mr. Lenahan: The insurance figures into it quite extensively.

Mr. Otto: As I see it, the rights of the parties are governed by this contract. If the carrier is liable it is by virtue of this contract. If the shipper is entitled to recover, it is by virtue of this contract. If there were any question of insurance, that is only a secondary matter, that is an adjustment which may take place after this case is determined, and not before.

101

The Chairman: We have not gone into it far enough to get an idea of what you are driving at. It does not seem to me this receipt can be of any disadvantage to anyone to put it in evidence.

Mr. Otto: I have no objection, as I said, although I do not see how it is relevant.

The Chairman: Well, let us decide that.

Mr. Lenahan: I offer the receipt in evidence. It is marked Dreyfus A and Dreyfus B.

(The receipt was loaned by Mr. Otto to Mr. Lenahan.)

102

Mr. Otto: We have shown that the grain was delivered to the Marine Transit Corporation in Buffalo, pursuant to this contract, and that the carrier has totally failed to deliver any of it to Louis Dreyfus & Company, New York. We have also shown the amount of the loss and the market value, and show that they have neither delivered the grain to Louis Dreyfus & Company nor shown its failure to so deliver was not due to its fault or negligence.

The Chairman: It is your contention that it was due to their fault?

Mr. Otto: Yes.

The Chairman: Do you want to put in testimony to that effect?

Mr. Otto: I believe it is up to the carrier to put in testimony to show what happened. As the grain was delivered to the carrier, they know best what happened to it, and I believe it is up to them to explain what happened.

104

J. McGOWAN, being duly sworn and examined as a witness for the Marine Transit Corporation, testified as follows:

BY MR. LENAHAN:

Q. What is your business? A. Steamboat captain.

Q. On the 25th of September, 1928, what vessel were you in command of? A. The Gerald A. Fagan.

Q. How long have you been engaged on steamboats? A. Six years.

Q. At that time, how long had you been on the 105
Canal? A. About two years—2½—something like that.

Q. Do you recall taking the barge Edward A. Ryan in tow on September 25, 1928? A. Yes, I do.

Q. How many other barges were in the tow? A. There were three.

Q. Where did you take them in tow? A. From a place called O'Shaughnessy's icehouse.

Q. Where were you going to tow them to? A. New York.

106 *J. McGowan. Called by Respondent. Direct.*

Q. At the time, were the barges loaded or light? A. Loaded.

Q. With grain? A. Grain—I guess so.

Q. You hadn't brought them down the Canal—they had been brought down by another tug—is that right? A. Yes.

Q. This tug was engaged in towing between Waterford and New York? A. Yes.

Q. How did you arrange the barges when you took them in tow? A. We took them from another tug. I believe Matton's tug.

107 Q. How were they arranged? A. One after the other, made fast.

Q. What was the head barge? A. The Ryan—I forget the first initial.

Q. The second barge was what? A. The Enright.

Q. The third? A. The Barton.

Q. Was there any space between the stern of the head barge and the bow of the second barge? A. No—coupled right up tight.

Q. How many lines were made fast between the stern of the head barge and the bow of the second barge? A. That I do not know for sure.

Q. Did you see them? A. No.

108 Q. You do not know whether they had cross or lug lines? A. I could see lines on the side—called lug lines.

Q. Before you got down into the Hudson River proper, you came through a lock? A. Yes.

Q. What is the name of the lock? A. U. S. Government Lock, Troy, New York.

Q. Have you towed barges through there many times? A. Quite a few.

Q. All this summer, haven't you? A. Yes.

Q. All last summer? A. Yes.

Q. All the season before, didn't you? A. Yes.

Q. Alongside of this Government lock at Troy, is the Hudson Dam, is that right? A. Yes.

Q. Before you get to the lock gates, is there any other pier there? A. A long pier extending out about—I should judge 200 feet—150—200, I guess.

Q. You mean from where you entered the lock, this wall extended out? A. From the lock gates.

Q. That is, as you were coming in that day, which side is that on—starboard side? A. Starboard side.

Q. Right-hand side? A. Right-hand side.

Q. What is that wall constructed of? A. Con- 110
crete.

Q. Is there any fender protection along the wall? A. No, there is not.

Q. At the time you went to the lock on the date in question, were you on watch on your tug? A. No sir, I was not.

Q. Who was? A. James Flynn.

Q. The mate? A. The mate.

Q. Were you out around the deck that day? A. I was out on deck, yes.

Q. Did you see the barge after he got inside of this long wall? A. I did.

Q. How were they following behind the tug then? 111
A. Coming right straight.

Q. Before you go further—how did the tug have the tow? A. She had two short hawsers of about 40 feet, something like that.

Q. Where did these hawsers lead from on the tug—where were they made fast? A. On the stern bitts, as they call it.

Q. These were about 15 to 20 feet from the end of the tug? A. Yes.

Q. Where did they lead to on the barge? A. To the corner—each outside corner of the barge.

Q. In other words, they are made fast to a cleat? A. Yes.

Q. That cleat is situated on the outboard corner, is that right? A. Yes.

Q. One on the starboard side and one on the port side? A. Yes.

Q. What is the idea of two short hawsers rather than a single one? A. Well, it is to control your boats better.

Q. Is that the usual and customary way of towing into this lock on two short hawsers? A. Some
113 come in on short and others on long.

Q. Was this out of the ordinary—the way you were doing? A. No.

Q. You had been doing it before? A. Yes.

Q. You have seen other people do it? A. Yes.

Q. You have done it yourself? A. Yes.

Q. After you got inside of this wall that you talk about, and you say that wall runs how far out from the gates of the lock? A. About 200 feet, as nearly as I can figure.

Q. When you got inside of that wall, did you see the barges then? A. Yes.

Q. How were they coming then? A. They were
114 coming right straight.

Q. One behind the other? A. One behind the other.

Q. How was the tug being operated as to speed at that time? A. She was under a slow bell—as slowly as she could run.

Q. When you saw them that time, how far were they away from this wall? A. About 8 or 10 feet.

Q. Then what happened shortly after that? A. I noticed they hooked up.

Q. What did? A. The boats.

Q. What happened to the line—did she change her position any—or course? A. Yes, she took a dive toward the wall.

Q. Did the captain try to break that dive? A. Yes.

Q. How did he? A. By steering his tug to the starboard, pulling the boats over from the wall.

Q. In the method you were doing, do you know, or can you give any reason to account for the dive or sheer this tug took? A. Not unless it is the pull from that end of that 200 foot wall.

Q. What do you mean pull? A. The water sometimes—the Ford Plant draws water on the other side of the river. 116

Q. Where is Ford's plant with reference to the Government Lock? A. On the east side of the lock.

Q. Where is it in reference to the dam? A. The mill is right at the dam.

Q. How far is that dam from the end of this long concrete wall, approximately? A. I should say 1,000 feet.

Q. Have you observed at other times, any set to the current of the river at this point? A. I have.

Q. How does it set? A. It sets toward the Ford Plant.

Q. Do you know whether or not Ford draws water at that point? A. He does—above the lock. 117

Q. When the barge took this sheer, was there any opening in this concrete wall? A. Yes, there was.

Q. I show you this picture, and I ask you if that correctly represents the situation along that lock wall? A. Yes, sir, it does.

Mr. Lenahan: I offer the photograph in evidence.

It is marked Marine A.

118 *J. McGowan. Called by Respondent. Direct.*

Q. What part of the barge struck the wall? A. The bow on the starboard side.

Q. Whereabout on the wall did it strike? Can you give us some point that we can fix the location? A. Right in that sluiceway in the wall.

Q. Was there any fender piling of any kind protecting the corner? A. No, sir, there was not.

Q. What happened then? A. I got over on the boat and put a canvas down, thinking I could stop the leak.

Q. You mean on the principle that if there was a hole, the suction would draw the canvas into the
119 hole, is that it? A. Yes.

Q. Was the canvas drawn into the hole? A. No, sir, I could not get it to take hold no way.

Q. Was any damage visible to you when you went over there? A. Yes, sir.

Q. How far down did you get the canvas? A. I thought I had it down to the bottom of the boat, so I went down in the bow and couldn't see any break there either.

Q. Then the boat sank, is that it? A. Yes.

Q. How long an interval from the time she hit until the time she was completely submerged? A. About half an hour.

120 Q. Did you see the barge when she was placed on drydock the following spring? A. Yes.

Q. Where did you see her at that time? A. Hildebrandt's Drydock.

Q. Did you observe the bow then? A. Yes, I looked at it.

Q. What did you find on the starboard side of the bow? A. I see a hole at the bottom of the boat, about, I should judge, 3½ high and 2 feet wide.

Q. Outside of that damage at that point in that hold was there any damage on the starboard side of the bow besides that? A. I did not see any.

Q. Do you know the purpose of that sluiceway in that concrete wall? A. Yes, I do.

Q. What is the purpose? A. To put driftwood out so it will not go down into the gates.

Q. Have you owned barges on the Canal? A. Yes, I have.

Q. Operated them yourself? A. Yes.

Q. You are a steamboat man? A. Yes.

Q. Now, from the nature of the break, as you saw it on the boat, did you form any opinion as to what happened to the boat? A. It looked to me as though there was something at the bottom of that 122 wall.

Q. That what? A. That caused the hole.

Q. It was a puncture? A. It looked that way.

Q. No damage on the top? A. No, sir.

Q. The boat is about how high? A. I should say 12 feet—13 feet.

Q. How far from the deck of the barge was the top of this hole? A. I should say 6 or 8 feet.

Q. In that intervening 6 or 8 feet, were there any broken planks in there? A. I did not notice any.

Q. Any cracks? A. I did not notice any.

CROSS EXAMINATION BY MR. OTTO: 123

Q. Do I understand, Captain, that you have been through this lock the past summer or the summer before? A. Yes, sir.

Q. Isn't it a fact this tug Gerald A. Fagan did not proceed through this lock and north of this lock before the date of this accident—isn't this the first trip of the Fagan through that lock? A. Yes, it is.

Q. On what boat were you before the date of this accident? A. I was on the E. O'Boyle.

124 *J. McGowan. Called by Respondent. Cross.*

Q. The date of the accident is the first time this tug went through the lock and north of the lock? A. Yes.

Q. Is there any particular reason why this tug never went on the Canal before or through the lock? A. Yes, she had a high stock before, and was not equipped to go up there before.

Q. Isn't it a fact it is a pretty big boat? A. No. There are boats up there bigger.

Q. She was over 80 feet long? A. I do not know just what the length is.

125 Q. You have been captain of the boat? A. Yes.

Q. Suppose I should say, according to the measurements on file with the authorities, the boat's length was over 80 feet. Would you judge that to be a larger or smaller boat than the average plying on canals? A. This is quite a big boat.

Q. As a matter of fact, are there any tugs as large as that, which would navigate the Canal through the narrow channel north of the lock with three or more loaded barges? Can you state one? A. I believe I can—the Winthrop.

Q. Any others? A. The canalers are 96 feet long.

Q. Will you name one? A. The Austin.

126 Q. How long is that? A. She is 96 feet or over.

Q. Do you know anything about the condition of the water level on the date of this accident? A. No, I do not.

Q. The captain of the tugboat was supposed to know the condition of the water. Isn't it the duty of the captain to know the condition of the water? A. I do not see why? There is no tide there.

Q. No current? A. There is a current, yes.

Q. Do you know that to be a fact? A. I do.

Q. On the date of this accident, was there any current where this boat fetched up? A. I do not know that.

Q. If I were to tell you, on the date of this accident, the water level was 2 feet below normal, would that affect the situation any? A. It would not, if Ford was not working his plant.

Q. Is not the current determined by the quality of water going over the dam? A. Not if it is 2 feet below normal—there would not be any going over.

Q. Then would there be any current? A. I suppose there would—Ford draws water enough. 128

Q. You do not know anything about currents then, or about water levels? A. I do not know just how it would—I would have to inquire from the lock to find that out.

Q. Now these three barges were close up? A. Yes.

Q. Two short hawsers about 30 feet? A. 30 or 40 feet, I said.

Q. So the tug would have to steer these three boats as really one boat, wouldn't it? A. I suppose it would.

Q. Well, would it? A. As a rule they follow right behind the tug.

Q. Would the tug have to two these three boats, if they are closely coupled, as one boat or one unit? 129 A. I think so.

Q. So that if it wanted to maneuver, it would have to maneuver three boats instead of one? A. Yes, that is right.

Q. In view of the two short hawsers, isn't it a fact the tug has complete control of the barges? A. As a rule, yes.

Q. Complete control of the steering of the barges? A. Well, I don't know anything about that.

130 *J. McGowan. Called by Respondent. Cross.*

Q. You know whether the tug controls the steering of the barge? A. I know she did control them until she got right to that point, when she took a sheer, whatever caused it.

Q. Was there any steering apparatus set up on this barge at all? A. That I do not know.

Q. You were there? A. Yes.

Q. You saw conditions before and after, didn't you? A. The short hawsers on them.

Q. Can you state, as a matter of fact, there was no steering apparatus set up on this barge at the time you picked them up? A. I couldn't swear to
131 it, no.

Q. You are captain, and it is the duty of the tug to make up the tow? A. The tow was already made —I took it from another tug.

Q. Isn't it a fact the tug Gerald A. Fagan pulled the Enright off when she was aground at O'Shaughnessy's? A. We did not pull her out. That was Matton's tug.

Q. You were not on watch? A. No.

Q. The mate was in charge? A. Yes.

Q. Is he here? A. Yes.

Q. What shift did you have? What is your regu-
132 lar shift? A. Mine was in the fore part—6 a. m. to noon.

Q. This accident happened about 5? A. Around that time.

Q. When did you have your rest then, Captain? A. We laid down at Troy for about six or eight hours, I believe.

Q. If you were on watch between 6 a. m. and 12 noon, and the mate relieved you at noon, and you expected to go back on watch at 6 p. m., when did you get your sleep? A. From early in the morning until noontime.

Q. From early in the morning until noon—if you were on watch from 6 to 12, you would not be asleep? A. I can lay down and sleep, as we have no work to do.

Q. You looked at the barges when you picked them up, didn't you? A. Yes.

Q. You noticed whether they were made up properly? A. They looked to be made up properly—one behind the other.

Q. You know something about whether a steering apparatus is set up on the barge or not? A. I see the steering apparatus, but whether it was set up for use I don't know. 134

Q. The steering apparatus was set— A. It was set on the bow.

Q. You do not know whether they were set up for use? A. I could not swear to that.

Q. I think you said that the barge struck right in the sluiceway, is that right? A. The lower end of the sluiceway.

Q. Isn't it a fact this barge struck about 18 feet from the sluiceway? A. No, sir.

Q. Isn't it a fact the tug continued full speed ahead slightly to starboard and dragged the boat for about 18 feet before she hit the sluiceway? A. No, sir. it wasn't under full speed at any time. 135

Q. I believe you testified that you were running under one bell, is that correct? A. They give slow bell—that is still slower than one bell.

Q. Did you testify you were operating under one bell, on direct examination—did you previously testify that the tug was proceeding under one bell? A. Under a slow bell, I said.

Q. What speed? A. Between stop and a slow bell.

Q. One bell is less than a slow bell? A. Slow bell is less than one bell.

136 *J. McGowan. Called by Respondent. Cross.*

Q. How did the tow approach this lock? A. One behind the other, as straight as could be.

Q. Did they approach from the east towards the west wall at an angle? A. No—right straight down for the lock.

Q. At the place where this boat first struck the lock wall, that is the west wall, is there any current? A. There is an offset there.

Q. Isn't it a fact it is dead water? A. Yes, dead water there, but when the mills are running, there is a draw to the west.

137 Q. Do you know whether the mills were working at that time? A. I couldn't swear to that.

Q. Isn't it a fact, Captain, you have been employed for towing between New York and Troy and not north of Troy? A. I cannot answer that, I would go wherever I was sent.

Q. Whether you were employed to tow between New York and Troy? A. No, I was not employed —there was no place mentioned—whether Waterford or Troy.

Q. Before this accident, did you do any towing north of Troy? A. I was not on long after the accident. I do not know where she went after that.

138 Mr. Lenahan: I object to that question. It is wholly immaterial.

Objection sustained.

Q. This particular boat, the Fagan, did you ever pick up any other boats north of Troy? A. Yes, I did. I went there after coming there—I did go there after.

Q. Before this accident? A. After the accident.

Q. Do you know what horsepower this tug Fagan has? A. I do not know for sure, I heard she had 300.

Q. Do you know how wide the opening is to the approach to the lock between the bullnose over the upper guide wall and the lock wall? A. I do not know just how wide it is, no.

Q. Can you judge, or estimate? A. I suppose about 100 feet.

CHAIRMAN (to counsel):

Q. Can you have someone here who is familiar with it, draw us a little rough sketch as to just how the dam, the Ford Plant and the lock and this long wall—so we can get a little clearer idea? 140

The Committee and counsel examine blueprint.

Q. This disaster happened in broad daylight? A. Yes.

Q. Any wind? A. No, not that I remember.

Q. Any unusual navigation conditions? A. No.

Q. I show you a photograph, and will ask you to identify where, on this picture, the Ryan struck first?

The witness indicates with a cross. 141

Mr. Otto: I offer the photograph in evidence. It is marked Dreyfus 5.

Q. Do you know the length of that wall from the jaws of the lock to the bullnose of the guide wall? A. Somewhere around 200 feet, I guess.

Q. Do you know the length of the opening of the recess there in the guide wall, where you indicated the boat struck? A. I do not know.

Q. Have you any idea? A. I suppose about 10 feet.

142 *J. McGowan. Called by Respondent. Redirect.*

REDIRECT EXAMINATION BY MR. LENAHAN:

Q. I forgot to ask you what license do you hold? A. 500 master's.

Q. From the United States Local Inspectors? A. Yes.

Q. Mr. Otto asked you about the size of the tugboat. How long is the towing steamer you were on last year? A. 110 feet.

Q. Do you know the Diesel tug Maple Leaf? A. Yes.

143 Q. Is she longer than the Fagan? A. About the same length.

Q. Do you know the Silver Leaf? A. I do.

Q. Do you know the tug Sherman? A. I do.

Q. How does she compare with the Fagan? A. I believe she is longer.

Q. How long is the steamer R. Lenahan? A. 150 feet.

Q. How big is the tug Southern Cross? A. As long as the Fagan.

Q. Do all these vessels operate up there? A. Yes.

Q. What is the horsepower of the steamer Lenahan? A. I don't know—somewhere around 500, I believe.

144 Q. What is the horsepower of the Sherman? A. I don't know.

B. S. Oakley. Called by Respondent. Direct. 145

B. S. OAKLEY, being duly sworn and examined as a witness for the Marine Transit Corporation, testified as follows:

BY MR. LENAHAN:

Q. In September, 1928, were you employed by the Marine Transit Corporation? A. Yes.

Q. Do you know the barge Edward A. Ryan? A. I do.

Q. Do you recall the barge Ryan loading in September 1928? A. I do.

146 Q. You operated the Edward A. Ryan along with several other barges, is that right? A. That is right.

Q. On this trip out of Buffalo, they were in tow of the tug Express? A. They were.

Q. Did you see the Express when in Buffalo? A. I did.

Q. Do you know Captain Lawton? A. Yes, I do.

Q. Did you see the barge Edward A. Ryan? A. Yes.

Q. Did you inspect her? A. Yes.

Q. What is your duty as regards these barges, when they come into Buffalo? A. To make sure of the proper number of lines and the conditions, 147 that the boats are seaworthy.

Q. A man by the name of Fred Lawton is captain? A. Yes.

Q. He had navigated boats down the Canal before, had he? A. Yes, he had.

Q. The other barge in tow—did you know the captain of the barge Vera M.? A. I do, his name is Moharzel.

Q. Had he been on the Canal previous to this? A. He had.

148 *B. S. Oakley. Called by Respondent. Direct.*

Q. And his son Edward? A. I did.

Mr. Otto: He had been on the Canal?
The Witness: Yes.

Q. The captain of the Enright? A. I knew who he was.

Q. You knew he had been engaged on the Canal prior to this? A. I did.

Q. Fred Noel? A. I knew him.

Q. And Crossen? A. Yes.

Q. And the barge Vera M.—did you see her be-
149 fore she loaded in September? A. Yes.

Q. The Frank? A. Yes.

Q. The Emily, the Ryan, the Clute and the Barton also? A. Yes.

Q. As a matter of fact, were you the only one who inspected the barges? A. With the exception of the Inspector who passed them for cargo.

Q. You knew the owner of the cargo had a representative inspect the barges before they loaded? A. Yes.

Q. Did they give you a certificate that the barge was in good condition, or just to load? A. Yes.

Q. Is this the certificate you received (handing
150 witness paper)? A. Yes, it is.

Q. Did you receive a seller's certificate for the receipt of the barge? A. Yes.

Q. On all the barges you go abroad, you have a talk with the captain when he arrives in Buffalo? A. Yes.

Q. Do you ask if there is anything wrong? A. Yes.

Q. If you find anything wrong, you have it fixed before they leave, I suppose—you testified you are with the Marine Transit Corporation, you are in

charge in Buffalo, and inspect the boats when they come in—you are stationed at Buffalo all during the Canal season? A. Yes, I am.

Mr. Lenahan: I offer the certificate in evidence.

It is marked Marine B.

Q. On this trip in September, you loaded grain belonging to Louis Dreyfus & Company on the Edward A. Ryan? A. Yes.

Q. 19,200 bushels? A. Yes, I remember that.

152

Q. You have testified that you know these barge captains were men who had experience in navigating on the Canal? A. Yes.

Q. In your opinion, they were representative men? A. Absolutely.

Q. Do you know the engineer of the Express—Ike? A. Yes.

Q. You knew he operated this Diesel engine—and Captain Lawton? A. Yes.

Q. Was the Express fully manned when she left Buffalo? A. Completely.

Q. The barges? A. All of them.

CROSS EXAMINATION BY MR. OTTO: 153

Q. Did you know the tug Gerald A. Fagan before this? A. No, I did not.

154 *Gerald A. Fagan. Called by Respondent. Direct.*

GERALD A. FAGAN, being duly sworn and examined as a witness for the Marine Transit Corporation, testified as follows:

BY MR. LENAHAN:

Q. You are an officer of the Marine Transit Corporation? A. Yes.

Q. What office do you hold? A. Vice-President and Treasurer.

Q. They are the owners, charterers of operating owners of the Express—the Diesel tug? A. They
155 are operating owners of the Express.

Q. And the tug Gerald A. Fagan? A. Yes.

Q. The barge Edward A. Ryan—was that being operated by the Marine Transit Corporation in 1928? A. It was operated under charter.

Q. Do you know what repairs had been put on the barge in the spring of 1928? A. In the spring of 1928, the barge had been thoroughly overhauled at considerable expense, and to my knowledge she had a whole new bottom put on her.

Q. You saw the barge before you chartered her? A. I did.

Q. Did you see her during the summer? A. I
156 may have once or twice.

Q. At any rate, you did not have any trouble carrying dry cargo? A. She always delivered her cargo in first-class shape.

Q. The Diesel Express—the Captain—what was his name? A. Lawton.

Q. Had you known him before he became master of the steamboat? A. He is duly licensed, I have known him quite a while.

Q. Did you know Joseph McGowan before you hired him for the steamboat Gerald A. Fagan? A. Yes, I knew he had quite considerable experience.

Q. Who was the mate? A. A man by the name of Flynn.

Q. Had you known him before you employed him? A. Yes, he was with the New Haven Railroad for sometime.

Q. He had been employed by Cummings? A. I believe so. He is duly licensed.

Q. Never had any trouble with him, did you? A. Never.

Q. Both competent men, you will say? A. Very competent.

Q. Did you hear the engineer of the Express testify? A. I did. 158

Q. Who was the engineer on the Fagan? A. I guess it was Fagan—Elmer.

Q. Had you had him previous to this time? A. Yes, for five or six years.

Q. Found him competent? A. Very competent.

Q. Now the tug Gerald Fagan—when was she overhauled prior to this accident? A. Completely overhauled in Augus[redacted] finished August 15, 1928.

Q. Was she in seaworthy condition? A. At considerable expense.

Q. Did you have any reports of any trouble or damage to the Ryan prior to this accident in the lock at Troy? A. I had no reports whatsoever. 159

CROSS EXAMINATION BY MR. OTTO:

Q. Do you hold any license? A. No, sir.

Q. Operate any boats? A. Yes, I operate quite a few.

Q. I say do you hold any license to operate tugs? A. You mean master's or engineer's—no, sir.

Q. You testified you knew Mr. Flynn, the mate of the tug Fagan? A. Yes.

160 *Gerald A. Fagan. Called by Respondent. Cross.*

Q. How long had you known him? A. From experience—probably about two years.

Q. From business experience, how long? A. The same time. His reputation preceded him.

Q. How long have you had him in your employ? A. I don't know.

Q. Approximately? A. The tug came out in August, this happened in September. I don't know whether a month, two or six. We have so many I don't know just where he was.

Q. You have no opinion as to how long Mr. Flynn
161 was in your employ before the date of this accident? A. No.

Q. You are Vice-President and have full charge of the operation? A. Yes—200 men.

Q. But the mate of the tug—you employed him personally? A. No, I think our Superintendent did.

Q. Do you know whether Mr. Flynn was on the tug Dorothy before the Fagan? A. I don't know.

Q. You own the tug Dorothy? A. The Company does.

Q. He was mate of the tug Dorothy? A. I do not recollect.

Q. What license does he hold? A. I don't know,
162 I presume—or he wouldn't be employed.

Q. Do you know how long he was employed by anybody else? A. I think with the New Haven Railroad, as inspector of repairs, for a couple of years.

Q. Do they do any towing on the Canal? A. I don't think so.

Q. Do they do any towing from Troy north? A. I don't know what their operations are.

Q. Do you know whether he was employed at all by Cummings? A. I don't know, but I understand they investigated—

Mr. Lenahan: Did you produce the bill of lading?

Mr. Otto: I have a bill of lading—I don't know what purpose you want it for—I have a copy, I have not the original.

Mr. Lenahan: Do you admit this is a copy like Louis Dreyfus & Company received?

Mr. Otto: I will admit it is a copy and that Louis Dreyfus & Company received a copy.

Mr. Lenahan: I offer the copy of the bill of lading in evidence.

164

It is marked Marine Exhibit C.

Mr. Otto: I ask Mr. Lenahan to advise whether it is his contention that Louis Dreyfus & Company, in writing, consented to any modification of the freight booking contract and the charterparty?

Mr. Lenahan: We do.

Mr. Otto: The charterparty is very clear.

The Chairman: The contract provides for the shipment of this grain, and this bill of lading proves the shipment of the grain.

Mr. Otto: No, sir, I can prove the shipment without the bill of lading. There is a clause which has objectionable features, the effect of which is to destroy the effect of the charterparty. The Members of the Committee who arranged the charterparty had in mind that very thing, and they therefore inserted this clause to protect themselves from an ex-parte declaration of rights. The bill of lading is handed to the grain shipper—to an agent of the grain shipper—after the grain has been delivered to the carrier. It has no alternative but to accept it. It has not agreed to it, it has already

165

agreed on what the terms of the contract will be—the contract and this charterparty. The bill of lading is a mere receipt for the goods. We can prove the receipt without the bill of lading. My objection to it is that the carrier has put in this bill of lading, in printed form, some self-serving declaration as to its rights, while the effect of which is to say, in spite of this contract, the shipper has no rights. I don't want to have the record in any improper form by allowing it to go in, as it serves no
167 useful purpose.

The Chairman: Did Louis Dreyfus & Company receive this copy of bill of lading—did they take any exception to it?

Mr. Otto: Why, I don't believe they did. I don't think it is necessary. They are protected by a charterparty which says this is the entire contract—"Bills of lading must be issued to conform with this charterparty in every respect"—if it does not conform, the bill of lading has no effect.

The Chairman: I can see no real reason for refusing to let it be used. The Committee thoroughly understands the part the contract
168 will play in this matter.

B. S. OAKLEY is recalled.

REDIRECT EXAMINATION BY MR. LENAHAN:

Q. I show you this paper marked Marine Exhibit C, and ask you if you delivered a copy of that to Louis Dreyfus & Company's agent in Buffalo? A. Yes, I did.

Q. Did they take it? A. I assume so.

Q. They did not give it back to you? A. Never saw it.

RECROSS EXAMINATION BY MR. OTTO:

Q. Mr. Oakley, I notice you just testified you handed that over to Louis Dreyfus & Company's agent in Buffalo. Do you want that to stand? What agent did you deliver it to? A. I cannot recall for certain. 170

REDIRECT EXAMINATION BY MR. LENAHAN:

Q. Is the Abel Forwarding Company your forwarding agents at Buffalo? A. They are.

CAPTAIN E. W. HOLMES, being duly sworn and examined as a witness for the Marine Transit Corporation, testified as follows:

BY MR. LENAHAN: 171

Q. What is your business? A. Marine supervisor and salvage adjuster.

Q. How long have you worked as marine supervisor and salvage adjuster—been called out along the New York State Barge Canal and Government Lock at Troy? A. Continuously since 1919. From 1916 to 1919 part of the time.

Q. As a matter of fact, you made a study of this lock wall and lock approach, for purposes of mak-

172 *E. W. Holmes. Called by Respondent. Direct.*

ing a change in order to prevent accidents? A. I have, yes.

Q. At the request of the underwriters? A. I have—and others.

Q. When you arrived at the Government Lock, the barge Edward A. Ryan was totally submerged? A. Not totally, she was decks under.

Q. The accident was all over? A. It was all over, and the barge was sunk in the jaws of the lock.

Q. There was no attempt made to salvage the
173 grain? A. You mean at the time she sank?

Q. When she lay there sunken? A. Not until the various interests got together and decided what to do, and abandoned the grain.

Q. To the United States Adjustor? A. Yes.

Q. And they pumped it overboard. Right.

Q. What was the reason? A. It was not worth anything as salvage, and cost too much to handle it.

Q. You saw this sluiceway we have talked about here, have you not? A. Yes.

Q. Which is shown on Marine Exhibit A? A. Yes, I have seen that.

174 Q. Did you ever have experience in similar sluiceways along at the entrance to locks and between locks on the Barge Canal? A. There is a similar condition existing between Locks 2 and 6, which has been recently altered by the State, but this sluiceway is not a very good evidence of it, these two jags in the wall are—

Q. What was done to correct this danger to navigation, as in the sluiceway?

Mr. Otto: I object to that, let the witness testify.

Q. From your experience on the Canal, this length of time, would you or not say this sluiceway and other notches that appear, are dangerous to navigation? A. They have constituted a danger and caused sinkings.

Q. What has been done at other places on the Canal where the same conditions have existed? A. Protection has been given them between 2 and 5 and 6. The walls have been filled in, and a smooth surface presented to the approach of the boat.

Q. What other methods have you seen used to protect the sluiceway? A. Fenders have been put in and guards put over various places. 176

Q. Does this picture itself indicate anything—danger? A. The lalder and the slot which would be to the south of that sluiceway are two jags in the wall—a boat—catch it, especially a rough-cornered boat or with a rough boat.

Q. Do you know other barges which have had such obstacles as this? A. Yes.

Q. How can you tell it? A. I have seen the boats.

Q. Have you seen the ladders? A. Yes, I have seen the ladders. It has been all bent up half a dozen times.

Q. What is the condition of the corner of the sluiceway? A. The concrete is knocked away in places. 177

CROSS EXAMINATION BY MR. OTTO:

Q. Will you kindly state where this other sluiceway is located? A. It would take as long to go to the east as to go to the west. This flight of locks at Waterford, to the head of the upper flight at the terminal, five locks, between each one of them

178 *E. W. Holmes. Called by Respondent. Cross.*

there are rises, and between Locks 3 and 6 they were about equal—10 feet or so—that is where they have been filled in at the present time.

Q. There were about 10,000 boats that passed through this Government Lock at Troy during the year 1928? A. I don't remember—quite a large number.

Q. Approximately—is that approximately correct? A. I would not say 10,000, as I do not know.

Q. But you might say it ran into thousands of trips being made, though—probably about 60,000
179 boats passed through the Government Lock at Troy since it was constructed? A. Probably have, yes.

Q. Do you know of any other boats that have been sunken in the Troy Lock before this disaster? A. A tug sank there right afterwards.

Q. I am asking if you know of other boats? There have been boats damaged before A. Yes, a Marine Transit fleet had a boat sunk there.

Q. This is the first boat in probably 13 years? A. No, sir.

Q. That was sunk in the lock? A. That was sunk in the lock—I will agree with you on that.

Q. During that time, probably 60,000 boats or so
180 have passed through this lock without accident, without sinking? A. Without sinking, yes.

Q. Not such a dangerous condition, is it? A. No, not such an awful dangerous condition, unless you get a condition which brings it about.

Q. You are not an engineer, are you? A. No.

Q. You have had very little experience, if any, in construction? A. I have had a great deal of experience in construction work.

Q. I believe, Mr. Holmes, you testified you were a salvage adjuster since 1916? A. Yes.

Q. During what period of time were you on construction work? A. Prior to 1916.

Q. Where? A. North Bend, Oregon—not in New York State.

REDIRECT EXAMINATION BY MR. LENAHAN:

Q. You do know, or you did testify, there have been a number of accidents at this notch in the wall? A. Yes.

Q. As a matter of fact, you made the trip with the State Engineers Department as to corrections to be made in the Erie Canal? A. With the State 182
Commission appointed by the Government and the Senate.

Q. One of the things you recommended was the abolishment of this sluiceway?

Mr. Otto: I object to the form of the question.

The Chairman: Do I understand you to say a number of these openings—sluiceways—had been filled up—closed up completely?

The Witness: Yes, sir, not closed completely, but a smooth surface wall has been placed across the face of them. 183

The Chairman: Below the water line?

The Witness: It is brought down very close to the water line so the boats cannot get under them.

The Chairman: They give a protection but do not prevent the water running in.

The Witness: Right.

Mr. Lenahan: We rest.

Mr. Otto: As I said in my opening, the duty falls upon the carrier—we will offer proof

184 *Libellant's Motion for Judgment.*

that we delivered the cargo—and that he was unable to deliver through no fault or neglect on our part. I do not believe sufficient evidence has been introduced to negative fault or negligence on its own part. They have attempted by several witnesses to show that this boat struck this sluiceway in the wall. Upon cross examination, I believe that they have admitted that thousands of boats have safely navigated through there without accident. There had been no sinking before this time, although the lock had been in existence for 13 years. I believe the captain of the tug has admitted the conditions of navigation were not unusual. It happened in broad daylight, no current, nothing unusual to account for this boat's striking. Therefore, the reasonable inference to be drawn from it is, there is nothing unusual in the conditions of navigation. There must have been neglect, which allowed this boat to sink, especially where experience over a long period of time has shown that it is not an inherently dangerous place; and furthermore, if it is a dangerous place, it is the duty of the captain of the tug to know it and figure his reckonings accordingly.

185

186

I therefore move for a judgment in the case, the carrier having failed to sustain its burden of proof, in showing its absence of neglect or fault.

Mr. Lenahan: Will you put on the record that you rest?

Mr. Otto: I will when I am ready.

Mr. Lenahan: Are you making a motion for judgment?

Mr. Otto: On your case, yes.

I am asking the Committee, Mr. Chairman then, to award without further testimony of the witnesses you see assembled around here, on the grounds that the carrier having rested its case without sufficiently explaining the cause of the accident in such a way as to negative the facts and reasonable inference of fault or neglect on its part, makes unnecessary the calling of further witnesses. I ask your Committee to rule on that before proceeding with my case.

The Chairman: May I ask if you prefer or 188
decide not to put in any evidence to show neglect on the part of the Canal Company?

Mr. Otto: No, I have a number of witnesses here that I expected to call, but I think that if the Committee felt the carrier's case had not sustained the burden of proof with respect to explaining away the personal fault or neglect, it would save time, but if the Committee has any doubt about that, I will call my witnesses.

The Chairman: I think you had better call your witnesses.

189

MAJOR JOHN D. MYTON, being duly sworn and examined as a witness for Louis Dreyfus & Company, testified as folows:

BY MR. OTTO:

Q. You are in charge of the United States Engineer's office at Albany, New York? A. I am.

Q. Did you serve in the United States War Department? A. Yes.

Q. The Government Lock at Troy falls within your supervision? A. Yes.

Q. You have charge of it? A. Yes.

Q. Do you recall September 25, 1928? A. I do.

Q. As the date the Edward A. Ryan sank in the lock? A. Yes.

Q. Do you recall the water conditions on that day? A. I do, sir.

Q. Were they lower or higher than normal? A. Approximately 2 feet lower than what is the normal stage of the river.

191 Q. How would that affect the current in the approach to the lock? A. The less water going over the dam, the less would be the current in the river, therefore there would be very little, if any, current in the approach to the lock.

Q. Do you keep a record of the velocity of the current? A. No velocity—we keep a record of the height from which we have a fixed table where we verify the discharge.

Q. From your records and your observations, are you able to state whether or not there was any current at the place where the Edward A. Ryan struck? A. That would be very little at that stage of the water.

192 Q. Is it or is it not true that the water at that place is practically dead? A. Practically at that stage of the river, yes.

Q. Do you know whether the records of your department show whether any other vessel sank in this lock prior to this date? A. We have no such records since the lock was put in operation.

Q. When was that done? A. In October, 1915.

Q. Do your records disclose how many boats passed through the lock during the year 1928? A. Yes.

Q. What was the number of boats? A. I couldn't tell exactly for 1928—approximately it would be between 9,000 or 10,000 boats, of all classes.

Q. Can you give us an estimate of the number of boats that passed through the Government Lock from 1915 to 1928? A. Of all classes?

Q. Of all classes. A. Approximately 100,000 to 110,000.

Q. Not one of them sank?

Mr. Lenahan: I object to that. He was not there all this time.

194

Q. You are speaking from personal knowledge and records of your office? A. Yes, from an examination of all the records.

Q. Do you consider that lock at Troy, as well as the approach thereto, a safe place for vessels to navigate—on August 25, 1928? A. I do.

Q. Will you kindly state what engineering school you graduated from? A. Renssalaer, at Troy.

Q. How long have you been in the service of the Government? A. In the service at Troy, since the spring of 1912.

Q. In your opinion, do you consider this sluiceway dangerous. A. There may be a certain element of danger under certain conditions. If there was any strong current there, a sluiceway of the type we have, without the upper guardway, would probably be somewhat of a menace to a boat entering the lock, if the boat happened to get crossways of the entrance. There are two factors which might make this sluiceway dangerous. I might qualify it further by saying that if the current at the time—the stage of the water—would be such as to create a current through that opening, of sufficient vel-

195

196 *John D. Myton. Called by Libellant. Direct.*

ocity to cause any great pressure to force a boat against the water, the water would be so high it would be practically closed—it would be so much closed that a boat, even loaded like the Edward A. Ryan, would strike the top of the wall.

Q. So that outside of the exceptional case, it is your opinion this sluiceway is or is not dangerous? A. I do not consider it as dangerous, no.

Q. The possibility of danger would increase, or be existent, only if there were two factors—the current and the method in which the boats approach the lock? A. Yes.

197 Q. On the date of this accident, was there any current? A. There could be but very little.

Q. So that in your judgment, was the accident caused by any dangerous condition of this sluiceway? A. No, sir.

Q. Or by any effect of any current? A. No, sir.

Mr. Lenahan: I will make a further motion to strike out the testimony, on the ground that the witness has not been qualified to testify as to what would effect a barge like the Edward A. Ryan.

Motion denied.

198 Exception.

Q. I believe, I am not sure, but I believe there has been a little testimony introduced about some ladders. You were listening to the testimony? A. Yes.

Q. Do you consider these ladders dangerous? A. No, sir.

Q. How are they built? A. They are set in—offset in the concrete wall—they do not project be-

yond the concrete, they are entirely behind the face of the concrete.

Q. Have you made any recommendations to the War Department with respect to changing this sluiceway in any way? A. No, sir.

Q. Do you consider there is any necessity for it? A. No, sir.

Mr. Lenahan: I object to the question and move to strike out the answer, it is immaterial what he thinks might be a necessity.

The Chairman: I think the witness is qualified as a man familiar with these matters. I think his testimony is all right. 200

Exception.

The Committee examines the blueprint.

The Witness: I would like to explain the statement made by Captain Holmes: there have been several accidents at the entrance to these locks. They have, in so far as I know, all occurred at the north end of what is known as a bullnose of the north guide wall.

Q. That is about how many feet from there? A. About 217 feet. At certain stages of the river, there is a cross current—an eddy—due to the discharge of the mouth of the Mohawk River. Boats have, during what we call the freshet stage, when more than 4½ to 5 feet of water was going over the dam, sailed into the end of this guide wall. They have broken our lamp off half a dozen times, and a ladder there, which has been smashed a dozen times. 201

Q. At the date of this disaster, the water was how much over the dam? A. 4½ feet.

202 *John D. Myton. Called by Libellant. Direct.*

Q. And that condition you speak of is about when the water conditions are about 4½ feet? A. Some of these accidents have also occurred by some of the boats coming across from the other side and getting into that swirl and endeavoring to turn too close to the dam.

Q. The distance from the bullnose of the upper guide wall to the east end of the lock wall I understand is how much? A. About 92 to 93 feet.

Q. The distance at the front of the locks is about what width? A. About 45 feet.

203 Q. The width at the place where the disaster occurred was about what? A. It may be 46 to 47.

The Chairman: I would like to know as to whether this opening goes all the way down to the bottom of the entrance?

The Witness: That I would not know. I was not on the construction, and offhand would not like to say—I think it does. If it does not, it is the exception. The elevation of that wall is 24 feet above sea level, and our minimum sill is minus 2, and that makes it 26 feet.

The Chairman: What is the draft of water in here at normal stages?

204 The Witness: Our projected depth is 12 feet, but there is in the neighborhood of 14 to 16—that is at the time of the last examination. You can see here we have 16 feet 7 inches, 15 feet 4 inches, 11 feet 6 inches—but that is over on that side.

Mr. Hitchcock: Where is the intake of Ford?

The Witness: This is the Ford Plant here (indicating). This is the opening in the bulkhead where the water passes through into the part there.

Mr. Hitchock: Do they run that all the time?

The Witness: Practically continuously. The time they do not run it is when the water gets so low they have to shut down.

Q. On the date of this accident, could the Ford Plant affect the current any, in view of the height of the water you have already testified to? A. Very little, for this reason: that you draw from the Ford at the power plant in that direction, which is the line of deepest water in the channel. Across here, the water is so shallow, with 2 feet of water going over, you could not shove a canalboat empty down into the dam. You cannot get across even with an ordinary launch, at low stages. If you consider contours, the main draw is right there (indicating on blueprint). 206

Q. That is out of the line of approach as the boats enter the lock? A. That is out of the line of approach as the boats enter the lock.

Q. How much water was going over? A. Thirty-seven hundred or forty, the average for the day.

Q. The normal? A. The normal for a navigation season is about 2½ feet.

Q. Does that create a suction down here, which might tend to pull water through the sluiceway at the low stage? A. No. 207

Q. Your maximum of current on the crest of the dam, which is probably twice what it would be up here for that discharge, including the velocity of approach, would be less than 1½ miles? A. The velocity of water immediately adjacent to the dam or right on the crest, including what is known as

208 *John D. Myton. Called by Libellant. Cross.*

the velocity of approach for the 37 feet of water, would be approximately 1½ mile current, but that is immediately on the crest of the dam.

Q. Would the velocity of the approach to the river be the same as on the crest? A. Not by 50 percent.

Q. So that the pull is 50 percent slower than the crest of the dam? A. At least.

The Chairman: This speed of current you spoke of—is that based on the stage of water?

209 The Witness: Yes, I explained that the discharge of the dam would not be the velocity in here (indicating).

The Chairman: That discharge over the dam, 1½ miles per hour, is with the stage of water that existed that day?

The Witness: Yes.

Q. What would be the velocity further back for that day? A. Where boats navigate, the velocity after you get back to the end of this wall here, would be beyond a point to where you have last changed on account of the approach to the dam. It would be probably 50 percent or a little more

210 than one-half the crest of the dam.

CROSS EXAMINATION BY MR. LENAHAN:

Q. You say three-quarters of a mile, in your judgment? A. Yes.

Q. It is a fact that three-quarters of a mile current, when the tow was coming down, this lock chamber was filled up and the gates were open, is that right? A. Yes.

Q. Therefore, you have three-quarters of a mile current entering into this guide wall between the guide wall down to the lock chamber? A. No, sir.

Q. How much? A. The only current you can have is the small amount that can get through this 10 foot sluiceway. This is dead water (indicating).

Q. Is there a current here? A. Yes.

Q. At what point between the end of that guide wall and this lock chamber does the current stop? A. It is the same as friction breaks. You have velocity here, that has got to expend itself. You have got a certain volume of water that has passed that 212
point. It has got to get out the only place. Therefore, the energy in the water here will have to lose itself, as the place is not large enough.

Q. Then it follows, this sluiceway does not cause a set through there? A. Very slight.

Q. It causes some, is that right? A. Certainly.

Q. The approach to these wickets, in your gates, also causes some disturbance in this water? A. What do you mean by wickets?

Q. The gates you open—the valve—when they are open, this causes a certain motion of water in here? A. Yes, sir.

Q. And a breaking up and backwash? A. No 213
backwash.

Q. When you close them, you get a certain amount of backwash? A. You cannot close them that fast.

Q. Will you tell us what difference the opening of these valves or wickets has in the flow in here? A. It lowers the water temporarily.

Q. Does that increase the current through here too? A. No, it is liable to draw the water from this side of the river into the lock.

214 *John D. Myton. Called by Libellant. Cross.*

Q. At what portion of the lock does the dam stop —what section of the lock? A. I would say 120 feet down from there (indicating).

Q. The dam comes right perpendicular to the lock chain?

Mr. Otto: The witness indicates about 125 feet.

A. I cannot give it to you, as the total lock is 585 feet, and I could tell better by the Ryan. The Ryan was 110 feet long, she was free of these gates and
215 her bow was there (indicating). I would say 125 feet to the center of the dam.

Q. Is it a fact that whatever set of the current is down through here, is always determined on this north wall right as you approach the guide wall? A. The set is this way (indicating).

Q. That is accentuated to some extent at least by Ford damming over the water, is that right? A. Very little.

Q. It is so, is it not? A. Yes.

Q. Besides these facts, this sluiceway tends to have a little effect on barges, or there would not— A. No, I would not say it has an effect on barges
216 or anything less than a rowboat or small launch.

Q. It does cause some effect to draw towards the north guide wall? A. It would be very little.

Q. If any commotion set in here by the operation of your valves, to fill or empty your lock chamber, that might cause a vessel to sheer, might it not? A. I would not say it would cause it to sheer, it would have a draw upon the vessel and should draw it straight forward outside.

Q. You are not very well acquainted with the navigation of a barge? A. I have seen thousands go through.

Q. You never handled one yourself? A. Yes, I have handled a tugboat—helped handle a scow.

Q. You did not tow them? A Yes, I have handled the wheel too.

Q. How much? A. Not much—enough to know what it feels like.

Q. What boat? A. My own—Thayer W. Totten.

Q. You towed in this direction—scows—in and around Albany? A. They were scows, not deep barges—about 10 feet.

Q. You never towed these canal barges? A. Oh, no. 218

Q. Now, as a matter of fact, do you know the condition of that ladder on the approach to this lock chamber—did you see it broken? A. Which ladder?

Q. On that lock wall. A. There are two.

Q. Either one? A. I have seen this one (indicating).

Q. Did you ever see it partially down—broken? A. No, not that I remember.

Q. Did you ever examine it? A. I have been up on this.

Q. Did you ever see it twisted—did you ever renew them? A. I couldn't tell you that.

Q. Did you ever examine your records on that point? 219

Mr. Otto: That is drawing it pretty fine.

Q. Why do you designate that north wall as a guide wall? What is that particular word "guide" used for? A. You can't call it "approach".

Q. Why do you use the word "guide"? A. Because it is a guide—protection for the boats to enter the lock.

Q. It was designated as "guide" so that the barges could get up against the side and rub right along? A. Yes.

Q. But it could not be used for that because you put in those slots into the wall, didn't you? A. It is used continuously for it.

Q. It was used so that when the boats came down they could drop over against this side wall and keep sliding along to get into the lock chamber—that is why you call it a guide wall? A. Not necessarily, they should slide along the wall. It is a guide—in the first place, you have a light on it which is a guide at night, that is giving you an approach into the lock. You have got to draw down here (indicating).

Q. I think, if you will remember, you said it could be used for the barge to rub along, so that if the Fagan, with this barge, let it go over against the wall and let it rub along, she wasn't doing anything out of the ordinary, isn't that right? A. Yes.

Q. And the barge should rub along all right? A. Yes.

Q. And you say she should clear this sluiceway—this ladder and this notch shown further back in this picture "A", is that right? A. Yes.

Q. So that if the captain of the Fagan did let the barge go over against the wall, that is what many other barges do in tow? A. Yes, but not in the shape, as I understand the Fagan went over.

Q. You did not see the Fagan, did you? A. No.

Q. Will you tell us, on this photograph, right where that notch in there is? A. I don't recognize what that one is. That is a recess left there for a buffer beam.

Q. Is there one on it? A. No, sir.

Q. They did not put it in? A. They never put it in.

Q. Do you know how many gallons of water Ford is allowed to draw off the upper dam by the—. A. He is allowed to draw all he can.

Q. Do you know how much he is capable of drawing in a day? A. I understand it is equipped for about 6,500 cubic feet per second.

Q. And the drawing of the water by Ford lowers the depth of the upper Hudson quite considerably? A. At times.

Q. At certain times you have to stop Ford from 224
drawing water? A. Yes.

Q. Your office does not keep any record of the number of barges that have their corners damaged or their irons torn off by hitting this notch in the lock wall? A. Not anything that amounts to anything.

Q. What do you mean—the sinking? A. Oh, no, we have several.

Q. Of what? A. Reports of accidents, knocking against this north guide wall.

Q. What is the nature—I am talking about the bullnose—I am talking about the accidents that come from these jags in the wall—this sluiceway? 225
A. As far as I know there was never any accident like the Ryan.

Q. No serious accident? A. Not that I know of.

Q. The barge Brennan was sunk trying to get into this approach wall—do you remember that case? A. No.

Q. The Alf being damaged in the same manner as the Brennan—do you remember that? A. No.

Mr. Otto: Which was this?

Mr. Lenahan: Getting into this long guide wall here.

226 *John D. Myton. Called by Libellant. Cross.*

Mr. Otto: At what particular point?

Mr. Lenahan: The bullnose.

Q. The Mython sank in this lock? A. Yes.

Q. When? A. October 12, 1928.

Q. The barge Pelham was damaged in this lock, was she not? A. Not that I know of.

Q. No record of the barge Brennan being sunk? A. They may have records of them, but I do not remember.

Q. But you told me you looked up your records —examined your records—you are talking from
227 your records? A. Then I misunderstood you. You will pardon me?

Q. Your testimony is now that you have not looked up your records as to the amount of damage that has been done along this guide wall at the approach entrance to this lock, is that right? A. No, I made no special investigation.

Q. Did you make an investigation of the tug Mython? A. Yes.

Q. Did she strike in the same set and sink in the lock? A. No, sir.

Q. Where did she sink? A. Middle gate.

Q. What did she hit? A. Not anything.

228 Q. She just came in and sank. A. She hung on a fender on a gate, she only had 6 inches freeboard.

Mr. Hitchcock: Were there other boats going through the lock immediately preceding the Ryan? Was it used very actively?

The Witness: Yes.

Mr. Hitchcock: You just closed the gates, filled it up, and the Ryan proceeded?

The Witness: Yes, immediately, the other three boats—the original tow—had passed through just preceding.

REDIRECT EXAMINATION BY MR. OTTO:

Q. Without incident? A. Yes.

Q. The lock was open and ready to receive it? A. Yes.

Q. Mr. Lenahan has just asked a question about the Mython sinking in the lock. I believe it is always important to know the circumstances surrounding. I believe you have already testified in part, but for our benefit, will you kindly state from your opinion, after your investigation, as to the cause? A. From the investigation which I made, the 230
Mython sank, due to the fact that the officer in charge allowed her to slip back and lay abreast of the intermediate gates, rather than against the smooth concrete wall, and as soon as the water was let into the lock, in order to raise to the proper level, his guard caught on the timber guard on the lock, causing him to fill up with water, and he sank.

Q. Only about 6 inches freeboard? A. From information I have received.

Q. In your opinion, is that a safe margin for a boat to navigate with? A. I would not like to testify as to that.

Q. Are any boats permitted to enter the lock 231
while the valves are being operated? A. No, sir.

Q. So that when boats approach the lock, is there any commotion of the water? A. They may approach the lock, yes, sir, before the gates are opened for them, but they are not supposed to get on top of the gate. He awaits the signal. If the signal is thrown for them to come ahead, the lock is prepared for them.

The Chairman: How far back would they stop waiting for that signal?

The Witness: Some of them, in coming down, if they have to stop, stop alongside that side, especially if they tow coming up. The down tow will hang on that side to let the up tow pass.

Q. Would it hit the ladder or sluiceway, or does that condition of striking the ladder or sluiceway exist only where there is some improper handling of the tow, or approaching at an angle?

Mr. Lenahan: Objected to as wholly incompetent and irrelevant, calling for an absolute conclusion, not based on the facts that have been brought out here, and on the further ground that while this witness is undoubtedly a great engineer in construction of locks, he has not been shown as ever having towed three barges or boats. He does not hold any master's license.

Q. In your opinion, were boats, coming into the lock or approaching the lock in a proper fashion—would they hit the sluiceway or the ladder to which your attention has been directed?

Mr. Lenahan: I object to that question, it is too general "boats coming in proper fashion". Can the witness understand what he means—"a proper fashion"?

Objection sustained.

Q. Something has been said about the Ford Plant. I believe you have testified a great deal about that. Will you again state whether or not the Ford Plant operated on this particular day, in the light of the water conditions to which you have already

testified, and that with reasonable probability have caused this disaster?

Mr. Lenahan: Objected to on the same grounds. It is only asking the question in a different way.

The Chairman: It seems to the Committee that the Major's scope of testimony should apply to the particular thing about which he is qualified to speak.

RECROSS EXAMINATION BY MR. LENAHAN: 236

Q. One other question on the effect of the lock: It is a fact that three barges 100 feet long—110 feet—drawing about 9½ feet of water—when they come down into this chamber here, the displacement in there does set up a little bit more suction, does it not? A. The same as into the lock.

Q. When moving through this confined space, that of itself sets up some backwash? A. To a certain extent, yes.

237

JOSEPH J. WHALEN, being duly sworn and examined as a witness for Louis Dreyfus & Company, testified as follows:

BY MR. OTTO:

Q. What is your occupation? A. Lock master—Government Lock at Troy.

Q. You are in charge of the handling of the lock under Mr. Myton's supervision? A. Yes.

238 *Joseph J. Whalen. Called by Libellant. Direct.*

Q. Do you recall September 25, 1928? A. I do.

Q. Did you see the tug Fagan with the three barges approaching the lock on that day? A. Yes, sir, I saw them out of the towerhouse window—they were coming down the river.

Q. Could you tell whether the tow was proceeding slowly or fast? A. I would not say it was going fast.

Q. Can you state whether it was fast or slow? A. No, I could not from the distance—towerhouse to the end of that guide wall is only 700 feet—600 or 700 feet.

239

Q. I appreciate you could not tell the speed of the boat from where you saw it, but could you tell from your observation whether it was going faster than usual, or slower than usual? A. Some come in pretty fast, some come in slow.

Q. What is your judgment on that point in this particular case? A. I think he was hooking them pretty slow—not going full speed.

Q. How did the tug approach the jaws of the lock—did it approach parallel or at any angle? A. At an angle when I saw it.

Q. The angle was in which direction? A. From where I seen the conditions when I looked out, and

240

saw them first, the Ryan boat was in the lead, he was rubbing the north guide wall with the starboard side.

Q. Can you indicate on the map or picture where the barge Ryan first struck the guide wall? A. From the report the lockman gave me—I take his report—it struck about 18 to 20 feet above that.

Mr. Lenahan: I object to that. It is hearsay testimony.

Q. This report was received by you in the performance of your duty? A. Yes.

The Chairman: Is that the customary way?

The Witness: Yes. The lockman makes a report to me, and I make out a report, as lock master, and turn it into Mr. Myton—my superior.

Q. What is the name of that gentleman who made the report? A. O'Neill—he was on the west wall, operating on the west wall at the time.

242 Q. From the report as I get it—your testimony is that from the report of Mr. O'Neill, one of the subordinates, the Ryan first struck about 18 or 20 feet north of a place indicated on this picture by the cross and "A"? A. Yes, sir, and they glided down the wall until it hit there.

Q. By "glided", do you mean dragging? A. Yes.

Q. What did you do after you saw the tow approach—did you leave the towerhouse and come down? A. I went down and got on board the boat and tried to help the captain pull the tarpaulins down over the bow—the water came in so fast we had to get off.

243 Q. On the day of this disaster, September 25, 1928, was the water lower or higher than normal? A. Lower.

Q. About how much? A. I should judge pretty close to 2 feet.

Q. And at the place of the distaster, was there any current? A. I would not call it a current, no.

Q. About what time did this barge strike? A. Around 5 o'clock in the afternoon—daylight saving.

Q. Broad daylight? A. Yes.

Q. Were the weather conditions good or bad?

244 *Joseph J. Whalen. Called by Libellant. Direct.*

Mr. Lenahan: There is no dispute on that. The captain said they were good.

Q. You have been a licensed master at this lock for how many years? A. Nine years last August.

Q. In the course of your duties, you have seen tows approach the lock—enter it? A. Yes.

Q. Can you state what in your opinion is the proper method of approaching the lock, of a tug and its tow, on the date of disaster, with reference to the walls indicated on this map—what course?

245 Mr. Lenahan: I object to that.

Question repeated.

The Chairman: Just what are your duties there outside of the actual care of the locks?

The Witness: I take care of time and generally supervise the operation of the lock.

Q. Do you consider yourself a competent judge of how to bring boats in and take them out? A. I do not want to throw bouquets, but I have seen them—I have been there since the lock was built. I worked on the construction of the lock and the dam. Lots of times we could tell some of the cap-
246 tains how they ought to come in, sometimes it is best not to tell them.

The objection to the question is sustained.

Q. When the barge Ryan first struck, was she parallel with the wall, or was she at an angle to it? A. From my observation, she was at an angle —she hit the starboard bow.

Q. How much of an angle? A. I would put it about 50 degrees.

The Chairman: You had gone down from the towerhouse to the top of the wall at the time the boat struck?

The Witness: No, sir, that was after, when it was in the lock. When it was taking water I came down.

The Chairman: Then your estimation of that angle is from this tower?

The Witness: Yes.

Q. You have heard this testimony of Major Myton, with respect to the number of vessels going through this lock during 1928 and from the time it was constructed? You have been working there since its construction? A. Yes. 248

Q. You have had charge of the records under Mr. Myton's supervision? A. I became lock master. I was left there, after we finished there, to look after the machinery—I operated it. Then when the lock master retired in August, 1920, I was appointed in his place. I was kind of an assistant lock master, assisting, before that—acting.

Q. Do you know of any other boat having been sunk in this lock before the Ryan? A. Never saw any.

249

CROSS EXAMINATION BY MR. LENAHAN:

Q. Mr. Whalen, I thought I understood you to say you did not see the boat hit—you did not know what point she hit, but you got that from the report of your lock tender? A. Yes.

Q. If you did not see her hit, how could you tell us at what angle—you just told us she hit at an angle of 60 degrees, yet you say— A. I saw her coming in the entrance of the lock at that angle.

250 *Joseph J. Whalen. Called by Libellant. Cross.*

Q. Was the whole tow at an angle of 60 degrees? A. No, the first boat.

Q. Did you continue to watch her? A. Yes.

Q. How was it you did not see her hit if you continued to watch her? You say you saw her approach the wall—you say you continued to watch. Now, you did not see her hit? A. I did not see her hit, I couldn't see it hit, as I could not see the face of the wall from where I was.

Q. You mean you did not actually see the point on the wall where the barge struck, but you did keep the barge in view all the time? Is that what

251 you mean? A. Yes.

Q. Did you have some concern, when you saw a barge coming in there at a 60 degree angle? A. Yes.

Q. Did you run out or anything? A. Yes.

Q. After she hit? A. Yes.

Q. But you say, from the time she entered this lock chamber, 225 feet from this point where she hit, she came right in at a 60 degree angle? A. She came into the entrance of the lock at that angle.

Q. She did get to the entrance of the lock—what do you call the entrance to the lock? A. I call it 20 feet above our gates—25 feet.

252 Q. You mean after she hit, she was at a 60 degree angle—you do not mean she came in there by the bullnose at a 60 degree angle and hit the wall at that 60 degree angle—you do not mean that, do you? A. Yes.

Q. Now, you say she was at a 60 degree angle when she got to the entrance, and you consider the entrance of the lock to the guide wall 225 feet—do you want us to understand, from the time she got by the bullnose or the north end of the guide wall, she came down 225 feet to a 60 degree angle?

A. No, she hit the guide wall, from what I understand, it was given to me.

Q. I want to know what you saw as distinguished from what somebody told you. Did you see her at the time she came by the bullnose? A. I saw her from the window.

Q. Was she at a 60 degree angle then? A. Yes.

Q. Then you continued to watch her, and for a distance of approximately 225 feet this boat kept being towed at a 60 degree angle, is that right? A. Yes.

Q. Were you looking through a closed window, 254
or open? A. Closed.

Q. Ordinary window-panes? A. Yes.

Q. What are you wearing glasses for—nearsighted or farsighted? A. I don't know, I get them fitted and they fit.

Q. Anyhow, you watched this tow—then she hit. You put it at a point, as I remember, about 20 feet to the north of the sluiceway, is that right? A. Yes.

Q. She went up against the wall? A. She followed down in that position.

Q. Then she went along until she fetched up on something? A. Fetched up on that corner of the recess, from what I understand she did, but I cannot swear to it. 255

Q. You don't know? A. No.

Q. Rubbing along that wall isn't anything out of the ordinary, is it? A. No.

Q. Plenty of tows come in there at an angle,—as a matter of fact, they all come in at a slight angle? A. They would have to, if the wate was running, that is the only way they have to come in.

256 Q. There is nothing out of the ordinary in letting a tow rub along the guide wall? A. No.

Q. As a matter of fact, it is well to have them over against the wall, in case anything happens in the locks, so the men can get out—that is partly the reason why the guide wall is there too? A. Yes.

Q. When the boat struck the wall and started to rub along it, that did not strike you as anything out of the ordinary, did it? A. No.

Q. You were very much surprised when she suddenly stopped, and found out she was sinking? A. Yes.

257 Q. Because you did not expect that? A. No.

Q. Then you and the captain got a canvas and you got onto the bow of the Ryan? A. The captain already had the canvas. I went to assist him.

Q. You got on the bow and put it down over the starboard bow, is that right? A. Yes.

Q. And you thought that the suction of the water, going into the boat, would hold the canvas in there until other means could be had? A. Yes.

Q. But there was no effect of the canvas which you put in? A. No.

Q. Not at all? A. No.

Q. Now that recess—that does not protrude out
258 at the bottom, does it? A. Not any further out into the lock chamber in the approach than the top.

Q. You say there is a recess there. That runs down to the bottom of the concrete wall, I presume, doesn't it? A. Yes.

Q. What do you call the recess, by the way? A. It is a recess we use to catch the driftwood that gets in there—to shove it out.

Q. Does timber get caught in there—logs? A. We get a lot of drift stuff. In order to get rid of

that, we use that to push it out and not get over the dam.

Q. Despite that fact, sometimes logs get crossed and jammed? A. At high water, yes, in a freshet.

Q. In a freshet you get more driftwood—it is just as likely some floating logs would get caught in there under normal conditions, more so than under the freshet conditions? A. No.

Q. In freshet conditions it would be so great it would carry it through? A. The water is so high above the elevation—it is above the roof of that—that is what holds them, but in normal conditions 260
it is always free.

Q. Now, the edge of this sluiceway, of course, that is part of the wall and runs down to the bottom of the river? A. I do not believe it does.

Q. What does it do? A. I do not believe it goes over 20 feet—it might go 10 feet—as when they started to build that it was an after consideration.

Q. So that you think in the face of this guide wall, this sluiceway of approximately 10 feet high—A. 10 feet deep from the water line.

Q. How wide? A. About 9 feet.

Q. Wouldn't it be possible for a half-submerged 261
log to get jammed in there? A. We watch it very close.

Q. How often do you inspect it for that purpose? A. Every day.

Q. Did you inspect it this day? A. No, I did not make an inspection for that day.

Q. If I told you the hole in this barge was about 6½ to 8 feet from the top to the bottom—understand—and you say the top there was no damage there—yet this corner of the sluiceway is absolutely

262 *Joseph J. Whalen. Called by Libellant. Cross.*

perpendicular, and the barge is perpendicular at the side, so that when she hit, the whole side of the barge would hit for at least 10 feet, shouldn't it? A. It should, yes.

Q. If I told you the testimony is that there was a hole punched in this barge below the water line, some 6 or 7 feet, would that indicate there must have been something stuck in the sluiceway and protruded out into the stream at that time?

The Chairman: I think it is proper for the witness to testify as to the position of the barge
263 and the straight edge of the sluiceway.

Mr. Lenahan: I will withdraw the question, it is an inference you can take.

Q. Did you see any floating timber after the boat sank? A. We picked up one plank of that boat. It was floating around afterward, all the hatches were floating around.

Q. I mean the one timber you picked up was broken, wasn't it? A. Yes.

Q. That timber you picked up afterwards, when you looked at the boat, because you had to jump on the boat, starboard side, didn't you? A. I got on
264 the stern and went down toward the bow.

Q. Then looked over the bow? A. Yes.

Q. At the water line or as far down as you could see in the water—you could see a couple of feet, couldn't you? A. She was about a foot when I got on.

Q. As far as you could see down or feel with a pole, you couldn't feel any hole? A. I did not feel down there. I cannot see under water very well.

REDIRECT EXAMINATION BY MR. OTTO:

Q. You saw a plank after the disaster? A. They claim it was a plank.

Q. Would you judge the plank may have come from the Ryan? A. I could not swear to it.

Q. Describe it to us, please? A. It was about 5 feet long and about 3 inches thick, I should judge 6 inches wide. They claim that is where it came out of.

Q. Did you notice whether it was smooth or rough? A. One end was pretty ragged.

266

Q. By ragged, what do you mean? A. Broken.

Q. Any spikes on it? A. Yes, there were spikes on it.

Q. Immediately after the accident, did you make an investigation—ask Mr. O'Neill anything as to how the thing was caused, in the regular course? A. Yes, I had him make out a report.

Q. Did he tell you anything at that time as to the speed of the boats? A. I do not remember.

Adjourned to 2:30 P. M., Thursday, December 12, 1929.

267

268 *James Wentworth. Called by Libellant. Direct.*

Met pursuant to adjournment, December 12, 1929.

Present as before.

JAMES WENTWORTH, being duly sworn and examined as a witness for Louis Dreyfus & Company, testified as follows:

BY MR. OTTO:

Q. Were you captain of the barge Edward A.
269 Ryan at the time she sank? A. Yes.

Q. You left with her from Buffalo? A. Yes.

Q. At O'Shaughnessy's Drydock, did any of the boats in tow of the tug Express go aground? A. Yes.

Q. Which boat or boats went aground? A. The John E. Enright.

Q. Was that the only boat? A. That was the only boat.

Q. How many boats were in tow of the Express when she left Buffalo? A. Six.

Q. After the Enright went aground, the tug Express went ahead with three of the six boats? A.
270 Yes.

Q. The tug Gerald A. Fagan picked up the other three, including the Enright—the John E. Enright and the barge Edward A. Ryan? A. Yes.

Q. How were the barges hooked up? A. One behind the other—what we call a tandem.

Q. Which was the head boat? A. The Ryan.

Q. Between the bow of the Ryan and the stern of the tug, how many hawsers were there? A. Two.

Q. Were they long or short. A. Short.

Q. About how many feet? A. My best judgment —40 to 45 feet.

Q. Was there any steering apparatus set up on the barge after it left O'Shaughnessy's in tow of the tug Fagan? A. No, sir.

Q. Could the barge do any steering? A. No, sir.

Q. All the steering had to be done, and the maneuvering had to be done by the Fagan? A. Yes.

Q. Tell us, Mate, what happened after the Fagan hooked up these three boats and left O'Shaughnessy's? Before you answer that question, how far is O'Shaughnessy's from the United States Government Lock at Troy? A. About a mile or a little less. 272

Q. Now, tell us, Mate, if you will, what happened to this tow after leaving O'Shaughnessy's. Were they towed slowly or fast? About what speed were they towed? A. A little bit faster than I could walk —what I call a dog-trot—pretty good speed.

Q. About how fast would you judge? A. About four miles.

Q. An hour? A. An hour.

Q. When did the tug Fagan first slow down? A. After I got inside the wall, I should say, about 80 or 100 feet. 273

Q. Then what happened after the tug slowed down? A. While I stood on the bow, it seemed to sheer slowly around, or suddenly reel, and went over to the pier and hit the pier and dragged down aways, about 60 feet, I should say, something like that.

Q. You say she sheered and hit the north guide wall—is this it (indicating on map)? A. Yes.

Q. After she hit the guide wall, did you say she dragged along? A. Yes.

Q. About how far? A. About 60 feet.

Q. From where? A. She came to the approach wall—I had a fender on when I first hit the wall—she dragged along on that fender until I struck this (indicating), then I lost my fender.

Q. Then the boat struck this recess wall? A. Yes, on the opposite side of this spillway.

Q. The southern end of the sluiceway? A. Yes—spillway.

Q. What were you doing, if anything, after the boat struck the guide wall? What did you say or
275 do? A. After I lost the fender, I jumped over onto the port side of the bow and shouted to them to slacken the port hawser.

Q. Did they slacken that hawser—I mean the tug? A. No, sir.

Q. I hand you a map prepared by the War Department, dated October 18, 1928, and signed "John Myton", and ask you whether this is the condition of the tow after she struck the north guide wall and just before she struck the sluiceway?

Mr. Lenahan: Whom did you say made this?

Mr. Otto: I say prepared by the War Department, signed by Major Myton, who testified.

276 Mr. Lenahan: He said he did not see the tow coming into the lock.

Mr. Otto: I am asking this witness whether he recognizes the tow to be in the condition as described by this map.

A. This is what we call the bullnose (indicating).

Q. Is that the condition of the tow just before she struck the sluiceway? A. It is a good comparison. This is my boat here—I have written (indicating).

Q. Will you indicate on the map where you were standing on the boat?

Witness does as requested.

Q. Did you say or do anything in addition to saying to the tug to slacken the hawser? A. Not until after I hit the spillway.

Q. Is that the position of the tow, just before it struck the sluiceway? A. Yes.

Q. About what time did it strike the sluiceway? A. That I do not know.

278

Q. About what time of the day, Captain? A. It must have been around 5 o'clock—a little after.

Q. After she struck this recess wall, what happened—after you struck the upper guide wall? First, you testify you struck, then you were dragged 50 to 60 feet before you struck the recess wall. During that time, what did you do? A. She apparently seemed to be going right along.

Q. Then what happened after that—did you say anything? A. After she struck the sluiceway?

Q. Yes. What did you say? A. I ran over on my port side and shouted to them to slacken the hawser.

279

Q. Did you say anything about "There she goes" or anything? A. That was after I got into the lock.

Q. The striking of the lock—did that jar you any? A. Yes, it raised the boat up, naturally.

Q. Did it jar you personally any? A. Yes, it jarred me.

Q. Did it break any planks on your boat? A. Before I got away there was a plank flew up almost into my face out of my boat.

Q. You recognized the plank as from your boat? A. Yes.

Q. Was there more than one plank? A. Two.

Q. Were they vertical or horizontal planks? A. Straight up and down planks.

Q. Did the boat take on any water? A. I stepped over and saw the blank raise my booby hatch. I looked into the hatch and saw the water coming in so fast, I dropped the hatch right where it was. Then I rushed to the other side of the boat again. I guess I was jumping up and down—they tell me I was.

Q. You had several children on board? A. I had
281 two daughters on.

Q. How soon after she struck this recess wall did the boat sink? A. I couldn't say how long. She had to run the length of herself after that.

Q. How many minutes? A. Five minutes—three minutes is a long time in such a situation as that.

Q. Did the tugboat pull ahead? A. Yes.

Q. Was she going fast or slow after she struck? A. She slowed up—it slowed up everything when it hit.

Q. After that? A. I brought straight up and came around more into the center of the lock, after she hit.

282 Q. After you got into the lock, the boat sank in the lock, the recess is about 20 feet from the lock? A. About that.

Q. In the picture it shows the Ryan in the lock sunken. Is that about the position as you recall it when she sank? A. Yes.

Q. After you got in, immediately after the accident, did the deckhand say anything to you about not slackening the hawser? A. Not until I asked him.

Q. What did he say? A. He said he could not until he had orders to do so from the captain.

Q. How was this boat loaded, Captain? A. She was loaded 4 inches by the stern—9 feet 8 inches ahead, 10 feet 3 inches astern—4 inches.

Q. So that it would be loaded more astern—about 15 inches more astern than in the bow?

The Chairman: Is that the customary way?

The Witness: Yes.

Q. In approaching this lock, were you going faster in approaching the lock—after you approached the approach, did the tug slow before or after you expected it to slow down? 284

Mr. Lenahan: I object to the form of the question.

Mr. Otto: He already answered that. He said it already slowed down after the tug got in 80 to 90 feet beyond the bullnose. I asked whether the tug slowed down sooner or later than he expected, inside.

Q. You just testified that the tug did not slow down until you came about 80 to 100 feet inside of the upper guide wall, as measured from the bullnose, in. Was that the customary place for a boat 285 to slow down? A. I do not know that, that is up to the tug captain—you use your own judgment on that; different times comes down different. Your tug fetches you down in different ways.

Q. Is this customary, as described on the map and as testified, the line-up of the tow after she struck the wall and just before she struck the recess wall—is that the customary way for a tow to come into a lock? A. Oh, no, sir.

286 *James Wentworth. Called by Libellant, Cross.*

CROSS EXAMINATION BY MR. LENAHAN:

Q. How long have you been on the Erie Canal? A. It was built in 1867, and I never lost a summer in my life.

Q. When your tug got inside the wall, how were you heading? A. Straight as you could run.

Q. Is that the way you expected her to go? A. Sure.

Q. How was your tow made up? A. One behind the other—tandem.

287 Q. How many lines out, Captain? A. Lug line on each side, a pair of cross lines.

Q. The cross lines were for what? A. To hold the boat from slipping sideways. There were tandem fashion and had a timber-hitch.

Q. You say you were coming into the lock straight as a die—did you— A. I did not say approaching the lock.

Q. When you got inside the guide wall, were you going straight? A. For a few minutes—after I got inside 100 feet, no, sir.

Q. What happened after you got inside 100 feet? A. The boat took a sheer—stagger.

288 Q. At the time, was the boat going straight ahead? A. Apparently.

Q. Did she have an equal strain on each one of the hawsers? A. Apparently she did.

Q. The tug was navigating properly, was she? A. Yes, sir.

Q. You had no fault to find with the tug, did you? A. No—at the present time.

Q. What do you mean? A. Just at the time. I had after I struck.

Q. After you struck the sluiceway or spillway, the damage had been done? A. Yes.

Q. In other words, after you struck the spillway, the hole was already in your boat? A. Yes.

Q. What was done after that was just a question of each man's judgment in a dangerous condition? A. The mate of the boat was excited—I will admit that.

Q. I mean slackening the port hawser after your boat had struck and did the damage would not have prevented the boat from sinking? A. No, not after that.

Q. And you did not ask them to slacken the port hawser until after? A. Before. 290

Q. How long before? A. When I was holding the fender dragging along the wall.

Q. Every lock on the Erie Canal is constructed somewhat similar to this Government Lock at Troy, is it not? A. No.

Q. Well, a lock has a long approach wall or guide wall— A. Out West where there are no dangerous locks—

Q. (Continuing) on the State Barge Canal—with construction similar as to the approach or guide wall at Troy? A. Some have about 10 feet bullnose on one side, some have 20 feet.

Q. Captain, I am only asking a fact. At the Government Lock at Troy, they have a number of concrete piers on the east shore of the river, have they not? A. Yes. 291

Q. On the western bank of the river, toward the west, they have an approach wall which is about 225 feet in length, isn't that right? A. Yes.

Q. In the locks on the Erie Canal, they have similar approach walls, do they not? A. Yes.

Q. That is what I asked you, and if you were going into a lock on the Erie Canal—or the Government Lock at Troy—is it anything out of the

292 *James Wentworth. Called by Libellant. Cross.*

ordinary for the head barge or side of the tow to strike the approach wall and rub along? A. No.

Q. You do it every day, don't you? A. Yes.

Q. There was no damage done to your boat when you hit the side of this wall, was there? A. No.

Q. When you hit the side, you expected to rub along as you have on every lock wall, didn't you? A. Yes.

Q. You did not have the slightest idea you were going to fetch up so hard as to stop the headway of the tow, when you hit the spillway? A. No.

293 Q. That was the furthest thing from your mind? As a matter of fact, if you have been on the Barge Canal or through the Government Lock at Troy, since it has been built, your starboard bow was fetched up along the wall and rubbed along the wall—was this the first time? A. The first time.

Q. You have seen it done? A. I have heard of it.

Q. As a matter of fact, if the lock was not ready to take you, you would not rub along the guide wall, so a man could get over on the guide wall and take your lines so you could stop your headway? A. Not on that side.

Q. Did you ever tie up on that side? A. Never.

294 Q. Why not? A. Because they tell you to—put you on the other side.

Q. They put you on the other side when a tow is coming up—they will have the proper way to get out, is that what you mean? A. I don't know.

Q. Now, you say you saw a plank come floating up. Would you state it was a plank out of the bow of your boat—is that right? A. Yes.

Q. You have what they call a stave bow? A. Yes.

Q. How wide do you say the plank is of that stave bow? A. We just put a new bow on that boat in

the spring—10 by 4 plank on each side, has corner nubs.

Q. In other words, the plank ran from the neck of your bow down to the bottom? A. Yes.

Q. The facing of it that showed was about 10 inches wide? A. Yes.

Q. It had a thickness of 4 inches? A. Yes.

Q. Around the top you had irons, did you not? A. Yes.

Q. The plank you saw floating up afterwards—one end was sharp or broken, wasn't it? A. Yes.

Q. The other end was absolutely clean, was it not? A. The one I had on the boat was not. 296

Q. Did they put one on the lock wall? A. I put that on. There were two. I pulled one out and left it there in case I should need it, but I burned it up for wood this summer.

Q. Did you enter the bow of your boat when you were damaged? A. No, sir, I could not get in there.

Q. I mean the bow deck? A. Yes, I was in the bow.

Q. Did you look in—did you see any plank broken on top of the bow? A. You couldn't see, they were under water.

Q. Did you see the boat after she was hauled out on dry dock? A. No, sir. 297

Q. So that you never determined exactly where the hole was on your vessel? A. I knew it was in the bow, by the look of the plank.

Q. You never knew how far from the top or bottom? A. No, I could not tell that, only from an estimate.

Q. How much freeboard was there on your bow—from the top of this bow plank to the water line? A. 9 feet 8 inches ahead.

298 Q. So that you had about 4 feet freeboard? A. Yes.

Q. Did you see any damage on any of that 4 feet? A. Above water?

Q. Above water? A. No, sir.

Q. Not even a mark, as far as you could see? A. No, sir.

Q. Will you tell us just a little more in detail? You state the bow was going straight ahead for the lock—the strain, as far as you could see, was as much on one hawser as another. That continued
299 until you were 100 feet inside the end of the bullnose, is that right? A. Yes.

Q. Up until that time, did you see the other boats behind you? A. I noticed them in looking back.

Q. They were in a straight line? A. Yes.

Q. Everything seemed to be going along fine, as far as going into the lock was concerned? A. Yes.

Q. You stated, when you reached a point 100 feet inside of this bullnose, something happened? A. Yes.

Q. What happened? A. The ship took a slide or sudden sheer and slid over until the wall.

300 Q. Did you see the tug change her course or do anything at that time? A. I did not notice. She seemed apparently to be running straight and enter the lock straight.

Q. As far as you could see, the tug was keeping straight ahead under a slow bell and she did nothing as far as changing her course is concerned, to bring about this sheer that your boat took, is that right? A. Why, she couldn't stop without hooking her up.

Q. When you got that 100 feet inside that wall, the tug was going ahead under a slow bell, is that right? A. Yes.

Q. She was going under a slow bell—she was not hooked up? A. I don't know. I didn't ask how fast she could go.

Q. I didn't ask how fast she could go. You came down from O'Shaughnessy's icehouse, and you told us after she got into the bullnose she slowed down, so that she did not hook up after you saw her slow down? A. Not that I noticed.

Q. And she was going straight for the lock, is that so? A. Your boat is going straight—as I said, after we got into the approach wall 80 feet, that is where I think she slowed down, then took a sheer— 302
went over and—

Q. Did your hawsers sweep out of the water? A. No, sir.

Q. Strain on them all the time? A. Strain on them all the time.

Q. Do you know of any reason why a tug keeping strain on her hawsers, going straight ahead, could cause a sheer on the boat? As long as she has strain and slowed down, it could not cause your boat to sheer? A. The water coming down from the back of the boat will cause the boat to slide.

Q. Is that what cause the boat to sheer? I will ask you a frank question, give me a frank answer 303
—you were on the bow of your boat at that time? A. Yes.

Q. Do you know of anything that this tug did or that any of the barges did—do you know or did you see anything that caused this vessel to take a sheer? A. No, not that I could lay to the tug.

Q. If they did take a sheer, it was some cause outside of the navigation of that tugboat, wasn't it? A. I don't know, I don't know what would cause it.

304 *James Wentworth. Called by Libellant. Redirect.*

Q. If you say you saw nothing you could lay to the tug, the same, vice versa—

Mr. Otto: I object to the question.

Mr. Lenahan: I will withdraw the question.

REDIRECT EXAMINATION BY MR. OTTO:

Q. You came here under a subpoena of the United States District Court? A. Yes.

Q. I understand your testimony to be that the sheer only occurred after the tug suddenly slowed
305 down?

Mr. Lenahan: I object to that question as absolutely leading. The witness said nothing about the tug's slowing down.

Mr. Lenahan: Did the sheer occur shortly after or immediately after the tug slowed down, Captain?

A. Yes.

Q. I believe that Mr. Lenahan asked you something about boats going in along the wall, whether they did any damage. If boats come alongside of
306 walls, parallel with walls, then there is no danger to the boats as a result of coming alongside—rubbing alongside—but as I understand your testimony to be, this boat came at an angle to the wall and struck the wall? A. That is correct.

Q. That is not the customary manner of approaching a lock? A. No.

Q. So that the boats may be damaged in this manner, but if they come along parallel with the upper guide wall or the lock wall, they would not have sustained damage? A. No.

Mr. Lenahan: I don't want to presuppose, but there is very little evidential value, if you put your own witness on and either ask or tell him the history of facts and ask him to say yes or no.

Mr. Otto: Now that you say he is my witness I have called. You suggested him—he is a member of the boat crew, and the boat was chartered or operated by your client. Therefore, I do not think your remark has very much weight.

308

Q. Will you explain, Captain, how this water came into the boat after you struck the recess wall? A. It came in through the hole.

Q. Did you look down the booby hatch? A. Yes.

Q. Did you see water pouring in? A. Yes.

Q. About how many minutes did you have to look at the boat before she went down? A. About 40 minutes.

Q. Between the time she struck the recess and the time she sank? A. Yes.

Mr. Lenahan: Did the captain of the tug come over on your boat?

The Witness: No, sir.

309

Q. Then the captain of the tug and Mr. Whalen came on your boat? A. No, sir.

Q. Did they try to put a canvas down on your boat? A. No, sir.

Q. Do you recognize Mr. Whalen? A. Yes.

Q. You did not see him on your boat trying to put a canvas down? A. Yes.

310 *John Hildebrandt. Called by Respondent. Direct.*

Mr. Otto: Will you stand up, please, Mr. McGowan?

Mr. McGowan does as requested.

Q. Did you see Captain McGowan? You mean to say you do not recognize him? A. No, sir; he was not on it.

JOHN HILDEBRANDT, being duly sworn and examined as a witness for the Marine Transit Corporation, testified as follows:

311

BY MR. LENAHAN:

Q. What business are you in? A. Shipwright and drydock business.

Q. How long have you been in the drydock business? A. Fifty years.

Q. Where is your plant located? A. South Roundout, New York.

Q. Opposite Kingston? A. Yes.

Q. Do you recall the barge Edward A. Ryan being at that drydock? A. Yes.

312 Q. Do you recall now where the barge Ryan was sunk? A. Damaged?

Q. Yes. A. Yes.

Q. Where was she damaged? A. On the starboard side.

Q. Did you go to Troy or vicinity to examine the barge Ryan? A. Yes.

Q. You were informed of where she sank—at the Government Lock in Troy? A. Yes, she was not there when I took her out.

Q. Where did you first see her? A. Lumber District.

Q. Did they bring her down to your drydock? A. Yes.

Q. Did you haul her out on drydock? A. Yes.

Q. Where was the hole in the barge? A. Starboard side forward.

Q. How far from the bottom of the barge? A. About a foot and a half.

Q. How far did the hole extend? A. I should judge about possibly 2 feet crushed in.

Q. Was there any broken plank on the bow besides those planks? A. No, not that I recollect.

Q. Did you repair the barge? A. Yes. 314

CROSS EXAMINATION BY MR. OTTO:

Q. You heard the witnesses that preceded you, didn't you? A. Yes.

Q. They said the boat was loaded 9 feet 8 inches forward, 10 feet 3 inches aft? A. Yes.

Q. What kind of bow? A. Stave bow.

Q. Straight up and down? A. Yes.

Q. It does not bulge at the bottom or top? A. No, sir.

Q. The planks are vertical? A. Yes.

Q. Will you tell us, when a boat loaded aft, as this one was, comes in contact with a flat straight 315 vertical surface, or such as you might find on the corner of a recess, what part of that boat will hit first? A. You mean if going head on?

Q. Yes. A. She will strike with her bow.

Q. What part of her bow? A. It all depends on circumstances—what angle she is at when approaching the spot she is going to hit.

Q. I told you she was trimmed 10 feet 3 inches aft. A. Yes, but she might have been coming in

against that surface on an angle, or going straight ahead.

Q. The boat was trimmed aft, the bottom part of the bow is the foremost part of the bow, isn't it, when travelling through the surface of the water? A. Yes.

Q. So that when it comes in contact with any flat surface, perpendicular, vertical, head on, the first part of that barge to hit is the bottom part of the bow, isn't it? A. I don't know about that, I would not know. I would want to see the surface it struck.

317

Q. What color of paint did this bow have on when you hauled it out? A. I think it was painted lead—drab.

Q. Sort of slate? A. Yes. I would not be sure —it runs in my mind she was.

Q. When did you go up and look at the boat—when on the Canal? A. I did not see her in the Canal.

Q. You saw her in Albany? A. At the Lumber District.

Q. What was her condition then? A. She was in a sanken condition, her stern was about under water—water on her deck almost as far as amid-

318 ships, and her bow was sticking up.

Q. How much of her bow stuck out of the water? A. At low water I think about 6 feet.

Q. This boat has 14 feet sides—about 8 feet under water when you saw her at low tide? A. Yes.

Q. When did you see her—the date? A. I cannot tell.

Q. About? A. I would not want to say.

Q. Sometime last summer? A. You mean the early summer of 1928?

Q. 1929. Do you know when she fetched up? A. I do not know anything about that at all.

Q. Was she in a body of water that freezes all winter? A. I don't know where she was during the winter.

Q. Did she have any indication of having been pressed apart, either by having grain left in her or ice outside of her? A. Yes, she did.

Q. Then in the condition you saw her, the boat was not in the same condition as she had been immediately after it hit the sluiceway? A. That I could not tell you.

320

Q. When did you take her down to your yard? A. I think in June, I am not just sure—somewhere about that time.

Q. How many days, months, after you saw her in Albany, did you take her down to your yard? A. Possibly a week.

Q. Do you know the date you sent her out of drydock? A. I do not.

Q. Do you keep records at your plant? A. At our plant.

Q. Did you have any occasion to know what you were coming here today for? A. No, I did not—just called me to come, by wire, I was asked to appear here, I did not prepare myself with any records.

321

Q. Isn't it rather an important matter to know when and how long a boat is in drydock in the orinary course of business? A. I would not think so. Sometimes you dock a boat and take a long time, and sometimes you—

Q. When a boat hits a sluiceway and is sunk for a period of one winter, would you assume that was to be a slight or serious job? A. It all depends on the condition of the boat.

Q. Didn't you have an opportunity to see the condition of the boat when in Albany? A. Yes, I did.

Q. You went up there for that purpose? A. Yes.

Q. You knew what kind of job you were getting? A. On top I did, I didn't know on the bottom.

Q. With whom did you discuss the matter when you went up to Albany? A. I don't know whether I discussed it with anyone.

Q. You didn't go up of your own volition, did you? A. I went up there representing a man who
323 bought the boat, and went there to get her out for him.

Q. The man bought the boat while under the water, while in the condition he saw her? A. As far as I know, he did.

Q. He bought a cat-in-the-bag, didn't he? A. I presume he did.

Q. You say you came down here today on an invitation—whose was that—whose invitation? A. Why, Mr. Lenahan asked me to come here.

Q. Did you discuss the matter with him? A. No, I did not. I did not see him until I came on here. I was over to Jersey City at Court.

Q. Have you discussed the matter with Mr. Len-
324 ahan? A. No, sir.

Q. You have with other people, is that right? A. No, sir; I have not.

Q. Will you try, as closely as you can, to fix the date the boat was actually hauled out of drydock? A. It would be nonsense for me to answer, for I cannot tell you anywhere near the time.

Q. You say you examined it in June? A. I wouldn't be sure, I think some time in June.

Q. Then it was hauled out of your drydock in June, some time probably? A. It might have been.

Q. June, 1929? A. Yes.

David F. Pickett. Called by Libellant. Direct. 325

DAVID F. PICKETT, being duly sworn and examined as a witness for Louis Dreyfus & Company, testified as follows:

BY MR. OTTO:

Q. What is your occupation? A. My title is lock man.

Q. By whom are you employed? A. The United States Government.

Q. How long were you employed as lock man? A. As lock tender and machinery tender, eleven years. 326

Q. You are stationed at Troy, New York—United States Government Lock there? A. Yes.

Q. Do you remember the sinking of the barge Edward A. Ryan? A. I do.

Q. September 25, 1928? A. I would not say anything as to the date, I cannot remember the exact date.

Q. On that date, were you handling the valves to open the gate to the lock? A. Yes.

Q. Was the gate open before the tug Fagan, with its three barges, approached it? A. Yes.

Q. When did you first see the tug Fagan and the barges? Where was the tow when you first saw it, 327 and where were you? A. The tow was up the river, this side of O'Shaughnessy's, when I saw it.

Q. After the gate of the lock was open, did you see the boats in the formation as described on that map (indicating Dreyfus' Exhibit A-1)? A. Yes.

Q. Where were you standing when you saw it? A. At the extreme end of the wall.

Mr. Otto: The place where the witness was standing when he saw the boats in this forma-

tion (indicating on map) are marked by the witness "X" and "A".

Q. Is this the position of the boats when you first saw them after seeing the fleet a considerable distance away? A. Yes, this is the shape they were in.

Q. Was the head barge, the Ryan, scraping the guide wall at that time? A. When I saw it, yes.

Q. About how far did she scrape the wall before she struck? A. My opinion is she was scraping about 30 feet.

329 Q. Did you see it scraping? A. I saw it scraping this west wall.

Q. Did you see anybody on board the barge Ryan? A. Yes, the captain.

Q. Where was he standing? A. On the bow.

Q. Will you make a cross there?

Witness indicates on the map "X" and "B".

Q. Did you hear the captain say anything? A. I heard him shouting—I couldn't make out what he was saying.

Q. How was he shouting? A. He was considerably excited, he was yelling at the top of his voice 330 —something I did not get—but when she hit I remember him saying "There she goes", then he hollered to the people on the boat to clean out the cabin, get all their personal effects out.

Q. When you saw this fleet first—that means after they got within the approach to the lock—you saw them, I think, some distance away, but you saw them in this position when they came within the approach to the lock? A. Yes.

Q. Did you hear anything on the tug at all, about the time you saw the boats in this position? A. Yes, I heard the jingle of the bell.

Q. How far away, approximately, were you from the tug? A. Probably 20 feet.

Q. So that from this point to the tug—about 20 feet—the distance from this point "C and D" on the map is about how many feet? A. About 45 feet —44—46.

Q. After you heard this bargeman making some noise, yelling to the tug, and after you heard the jingle on the tug, did you hear or could you see anything else? A. Yes; I heard the lockman. He gave instructions to go and get some manure, and we ran away from there.

Q. That was afterward—after you saw the boats in this position and after you heard the bargeman yelling to the tug—what he was yelling you couldn't understand—then you heard a jingle on the tug—did you see and hear the barge strike anything? A. Yes.

Q. What did it strike? A. It struck the corner of this recess.

Q. You saw [redacted]? A. Yes.

Q. Did you notice the boat taking on any water immediately? A. Yes.

Q. Did you notice whether the barge had any steering apparatus set up for steering? A. There was none set—the cables were not set.

Q. What kind of a day was it? A. Beautiful.

Q. What was the visibility? A. Sultry and clear.

Q. Broad daylight? A. Broad daylight.

Q. You have been lockman for the past eleven years? A. I have not had that title, but I am working on the Troy lock for eleven years.

Q. You have been lockman for how many years? A. Five years.

Q. During the immediate past years, during that time, have you seen any tug with a tow of three barges or more, approach the lock in the manner as described on this map? A. Not to my knowledge, I have not seen anything like that at all—only this particular fleet.

Q. Does this map describe the conditions of the lock and the position of the boats as you knew them to be? A. Yes.

Q. As prepared by the War Department, so far as you know? A. Yes.

Q. Since you have been at the lock, have you seen or heard of any vessels striking that recess wall before this? A. A glancing blow, yes, the tow strike the wall.

Q. Any damage to the boat? A. Not until now.

Q. Never heard of a sinking in this lock? A. No, this is the first one.

Q. If the barges approach the lock parallel to this guide wall, instead of at an angle, would they sustain any damage by just scraping along the side of the wall? A. I don't see how they could. They had fenders on them. They generally glide along the guide wall.

Q. One of your duties is to open and close the locks? A. Yes.

Q. You handle the valve which is located at this place? A. Yes (indicating "E" on the map).

Q. Can you state whether or not there was any driftwood in the recess wall on the date of this accident? A. There was no driftwood.

Q. If there were, would you have known it? A. We would have to get it out before we could open the gates. Any driftwood behind the gates we had

to get out and have the river clear in order to swing the gates back into the recess.

The Chairman: You use the word "recess". We have been using the word "recess" for this (indicating). This recess, you say, is where the boats clip so they would be flush?

The Witness: Even with the wall. We call this a recess—it is a sluiceway. We push all our rubbish out through here.

The Chairman: I think it would be well if we could remember to call that "sluiceway", as 338
"recess" to me is not necessarily an opening, so for the record call it "sluiceway". We understand, now, what you are talking about. If these minutes were read a year from now, there might be confusion.

CROSS EXAMINATION BY MR. LENAHAN:

Q. You say there was no driftwood in the recess, because if there were, the gates could not be open —you could not operate the gates. Now, then, could any driftwood or submerged logs creep into the sluiceway, that had nothing to do with operating the gates? A. Certainly not. 339

Q. Now, you say in answer to another question, that you have seen boats hit this sluiceway before and then go right on—roll over? A. I saw boats hit the north guide wall and glide right along.

Q. Even the corners of the sluiceway? A. Yes, because it is all chipped off.

Q. Many boats have hit it? A. Yes.

Q. You have seen many hit it, glide along and go by? A. Yes.

340 *David F. Pickett. Called by Libellant. Cross.*

Q. You know when they go by too, don't you? A. Yes.

Q. What is the shape of the bows of these boats? A. Different shapes.

Q. The Ryan—the ordinary Barge Canal boat? A. I would not know, couldn't give it to you right, but I should judge it is quarter-round.

Q. On the corners, isn't it? A. Yes, in other words flat across.

Q. The Barge Canal boats have all got a round bow on the corner? A. Not all.

341 Q. What I term the Barge Canal boats—they say these barges, such as the Ryan, the one we are talking about, have what they call a stave bow, which is round on the corners? A. I wouldn't swear as to that.

Q. It is nothing unusual for a barge to rub up against the guide wall—rub along—you have seen it hundreds of times? A. Sure.

Q. When you saw this barge rubbing along the wall, before she came to the sluiceway, you did not think it was anything out of the ordinary? A. Yes, the position she was in.

Q. What was the matter? A. She came in on an angle.

342 Q. How much? A. I don't know.

Q. Isn't it true that the more angle she came in, the more broad surface she would expose to the sluiceway? A. Yes.

Q. If she exposed the broad of the bow—and I am talking about straight across—if she exposed the broad of the bow, she could get in the sluiceway? A. She couldn't get in there, but she was at such an angle that she did.

Q. Did you say this correctly represents the angle or not (indicating map)? A. As far as I can re-

member, that is the angle it came in on—any more than this boat is backed the wrong way—this boat was a little over—angling this way—pulling in behind the boat over there (indicating).

Q. You didn't see the boats when they took a sheer? A. Not until they got within 30 feet.

Q. When you saw them, they were up against the wall? A. Yes, scraping the wall.

Q. You don't know anything about navigation of boats, do you? A. No, sir.

Q. But you do know if they came in on an angle like that, when the starboard bow hit that wall, 344
that would tend to throw the whole tow parallel to the wall, wouldn't it? A. No, it would have a tendency to straighten them up, if it did something like that.

Q. What angle did you say she was coming in on? A. 60 degree angle.

Q. Do you know how long the barge is? A. We have a record up there, I think it is a trifle over 100 feet.

Q. Do you know the distance between the two walls there at the point of that sluiceway? A. I believe it is 44½ feet.

Q. Was her stern hitting the other side of the 345
wall? A. I think it was.

Q. Was Mr. Whalen there before you were there? A. Yes, he sent my partner and myself for manure thinking they could patch it up.

Q. Did you see where Mr. Whalen went? A. We both took it on a run, we had to go three blocks to get the barrel to put the manure in.

Q. You don't know where Mr. Whalen went? A. I don't know.

Q. Did he go down toward the barns? A. I don't know.

346 *David F. Pickett. Called by Libellant. Redirect.*
Captain Crossen, Jr. Called by Libellant. Direct.

REDIRECT EXAMINATION BY MR. OTTO:

Q. When you first say the boats in the position as indicated by the map, was Mr. Whalen there? A. I couldn't tell you, we were all excited.

Mr. Otto: I offer the blueprint in evidence. It is marked Exhibit L D A-1.

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347 CAPTAIN CROSSEN, JR., being duly sworn and examined as a witness for Louis Dreyfus & Company, testified as follows:

BY MR. OTTO:

Q. You are a captain of steamtugs? A. Yes.

Q. What license do you hold? A. New York Harbor and Lower Bay, Hudson River to Yonkers.

Q. You are employed by whom? A. Pennsylvania Railway.

Q. How long have you been acting in the capacity of captain of steamtugs? A. Twenty-five years.

348 Q. During that period, have you had occasion to go in or out of locks? A. Yes.

Q. Government and other State locks? A. State locks.

Q. Will you look at that last chart. Assuming the boats were brought into a lock in that fashion, would you call that proper or improper? A. It is not that I ever navigated this canal or in this lock, but in the position of these boats, they are not coming in proper.

349

Q. Assuming the boats were in that position, rubbing along a lock wall, you are in charge of the tug, such as the Fagan, is it the proper maneuver to send that boat ahead on a so-called jingle? A. I would not do it so near the approach to the lock.

Q. Why wouldn't you? A. Well, if I know the sluiceway was here, I would figure before I could pull clear she would hit it. I would rather stop and back my boat up against the head boat, then back this way, instead of increasing.

Q. If I ask you to assume the boats were approaching the lock at a rate of speed approximating 3 to 4 miles, would you say it was dangerous to go ahead? A. Absolutely.

350

Q. Would you say it was safe towing, whether boats were crooked, straight or otherwise, to the head of the lock? A. It would be absolutely unsafe, so close to a lock, going 3 or 4 miles an hour.

Q. Do you know the tug Fagan? A. No, only by hearsay.

Q. I think there is testimony in the record that the tug is of the capacity of 300 to 335 horsepower. Would you call that a large or small tug, as to her horsepower? A. That is a fair sized tug.

Q. Large tug for the Canal? A. Large tug for the Harbor.

351

Q. Would you say three barges, of the size 22 feet large, 101 feet long and 10 feet 4 inches side, loaded with approximately 400 to 500 tons of cargo, was a heavy or light load for that boat? A. I would consider she would be perfectly able to handle that tow. I would consider it a natural tow for her.

Q. Could she handle them with dexterity? A. Oh, yes, in a fairway she could.

Q. So she could check up with no particular loss of time? A. Absolutely no loss of time, if he wanted to back up.

The Chairman: What is the so-called jingle bell?

The Witness: It means to give all you got.—go ahead full speed.

The Chairman: Is it the duty of a competent tug captain to know the set of the tide and current and the hook-up of the boats that she has in tow, at all times?

353 The Witness: Absolutely, whatever he is towing.

Cross Examination by Mr. Lenahan:

Q. Did you ever see the Government Lock at Troy? A. I have never navigated that, but I have been on other locks through the Raritan.

Q. How much water can you take through the Raritan? A. Seven.

Q. How wide a boat? A. 22.

Q. How big are the locks? A. About 225.

Q. How wide?. A. About 33-24.

354 Q. How long did you tow that Canal? A. I towed five months on the Raritan, but I have been going in and out of these since I was a baby.

Q. How long did you tow? A. Between five and six months.

Q. That is the sum total of your experience in towing in canals? A. Yes. I have towed up to the oulet lock for the last twenty-five years, but I actually towed through the Canal.

Q. As a matter of fact, you are not permitted, under the law, to take a steamboat north of Yonkers, are you? A. That is it.

Q. All the towing you have done, outside of the five months you mentioned, has been in tidal waters, is that right? A. Yes.

Q. You do not attempt to pose as an expert taking vessels into a lock, when you never saw the lock or conditions surrounding it? A. The conditions are better than conditions in the Raritan Canal. You have more room to maneuver.

Q. I asked you a fair question. Would you presume to act as an expert, as to towing in a place that you have never seen or never operated a tugboat? A. Yes. When you ask me about entering a lock anywhere. 356

Q. Anywhere? A. You have got to take the same precaution going into any lock.

Q. Even the Panama Canal? A. Anywhere where you have got to wait for a gate to open.

Q. You said you have towed vessels in State or Government—what Government lock? A. I said the Raritan Lock.

Q. Is that a Government lock? A. It is a State canal.

Q. Are you sure of that? A. Yes, leased to the Pennsylvania Railroad.

Q. What boat are you on now? A. The P. R. R. 32. 357

Q. Where do you operate from? A. From South Amboy and all around the harbor.

Q. How big a tug are you on? A. Horsepower 700.

Q. You said, in answer to a question, that you have seen the tug Gerald A. Fagan? A. Absolutely, different times.

Q. You say a tow of three barges is a fair tow? A. I say the Gerald Fagan ought to handle three barges anywhere, if she is handled properly.

358 *Captain Crossen, Jr. Called by Libellant. Cross.*

Q. And you said something about that you would not give a boat a jingle under certain conditions. What conditions do you refer to? A. In a condition like this, when you have an obstruction a few feet away that you are going to strike, if you cannot straighten them up.

Q. If you were going up the East River with three round-cornered barges in tow, and for some reason or other one of the barges took a sheer, what would you do to break the sheer—would you back up or give a jingle?

359 Mr. Otto: Objected to, as there is no foundation laid for that testimony.

Objection sustained.

Q. If you have three barges coming along straight, and for some reason they take a sheer, the thing to do is to use your own best judgment how to break— A. The best judgment is to keep away from the object far enough so you will not have to.

Q. I said, if you had three barges in tow, and they took a sheer, the better part of judgment or valor would be try to break the sheer? A. That all depends on the circumstances. If you have the
360 room, sometimes by giving this extra jingle or strain, when going into something, you will part that port hawser and away she will go. You are helpless than with one hawser out, while if you pull steady you may pull clear.

Q. Then it all depends on the judgment of the master? A. Absolutely. He can see his distances —how far the object is away.

Q. Yes, if you had the barges in tow and they take a sheer— A. Those barges?

Q. Any barge—they took a sheer and headed for an object, you would act on your own good judgment, whether to give a jingle or stop or what to do? A. If I had these barges in tow in slack water and saw they were going to hit, I would not go to hook up, a few feet away.

Q. I said if you had three barges in tow, and saw them take a sheer for an object, it would depend upon what you thought in that minute would be the best thing to do? A. Certainly, whether safe to hook her up or safe to slow her down—which would be her own job.

362

Q. And the reason you would not hook up is that you would be afraid you would part a hawser? A. Absolutely.

The Chairman: If you were within 20 feet of a gate to a lock that was open, or 200 feet of a gate that was closed, would you consider it good judgment to hook up a tug, going about three miles an hour?

The Witness: Absolutely not.

The Chairman: Why not.

The Witness: You are too close to the lock—too close to the gate.

The Chairman: Liable to go through the gate? 363

The Witness: Yes.

Mr. Otto: Did you ever qualify in any Federal Court as an expert?

Mr. Lenahan: I object to that as incompetent and immaterial.

Mr. Otto: You questioned this man's qualifications.

Mr. Lenahan: I certainly do, for attempting to pose as an expert on some situation he never saw.

The Chairman: It seems to me if he qualified in a Federal Court, it would be on what basis he qualified.

REDIRECT EXAMINATION BY MR. OTTO:

Q. Captain, did Mr. Lenahan ever call you as an expert in a Federal Court case? A. No, but his partner has, and sad to say I had to go against him this morning, and he is one of my best friends.

365 Mr. Lenahan: Did my partner ever call you as an expert on canal navigation?

The Witness: No, sir.

The Chairman: Did they ever call you as an expert on tugboat management and operation?

The Witness: Yes.

Mr. Otto: That is what I called him for. Whether any tugboat in towing barges of that type at a fair clip, and the tug suddenly slowed down, what happens to these barges?

The Witness: The head barge will naturally take a sheer one side or the other.

366 Q. That happens how often? A. Any time you stop, when you have got way on your tow.

Q. If I told you this tug was bringing these barges in a sort of pocket or dead water, would they do that? A. Why certainly, so long as they come in with way on. When the tugboats stop or slow down, that tow has got to go either one way or the other, they will not come directly straight, they sag one side or the other.

Q. Is it necessary that the towing hawser be slack in the water for that condition to exist? A. Certainly.

Q. If you have a set of boats, such as that, along the wall, with the head boat parallel, and the tug is hooked up, will the quickwater or wash from the propeller have any effect on that head boat? A. To a certain extent. If the tug is pulling on one side, the quickwater is hitting that tow and has a tendency to drive her over to the wall.

Q. The faster her hook-up, the faster it would drive into the wall and hold there? A. Yes, and until he could maneuver his boat to get out far enough to port his wheel to pull away from the wall.

368

Mr. Lenahan: Did somebody tell you this was dead water up in this place?

The Witness: No, not exactly dead water.

The Chairman: My recollection is there was very little current that could be referred to.

Mr. Otto: Would that same condition exist, to which there has been an objection, if there was very little current instead of still or dead water, the boat sagging over?

The Witness: Yes, that could exist just the same with a little.

RECROSS EXAMINATION BY MR. LENAHAN: 369

Q. Will you tell us why, with straight corners alike, these barges—and they are all straight in line—if you slowed down and let the strain off, why they will sheer? A. The quickwater from the tug is one thing. These two boats may be shoving the head boat ahead—that will cause it to sheer.

Q. What will shove them? A. They may be carrying better way than the head boat.

370 *Roy Oatman. Called by Libellant. Direct.*

Q. Suppose they are all the same kind of barge? A. I do not know as there are two barges exactly alike.

Q. You don't know that? A. No, but I never heard at all of two boats of any description exactly alike and handled alike.

ROY OATMAN, being duly sworn, and examined as a witness for Louis Dreyfus & Company, testified as follows:

371

BY MR. OTTO:

Q. You are employed as what? A. As captain on steamboats.

Q. What license do you hold? A. Master's for New York Harbor, Long Island Sound, Hudson River, New York State Barge Canal, Buffalo Harbor.

Q. Have you ever been through this Government Lock at Troy? A. Yes.

Q. How often? A. Ten or twelve times every summer.

372 Q. How many summers? A. Since 1919.

Q. Will you look at that chart in front of you, and tell us whether or not that is a proper manner in which to land at the further end of the Government Lock at Troy? A. If it landed outside of the lock it would go into it—it would go into the lock.

Q. Is it proper? A. No, I don't think it is proper.

Q. If I told you the tow was proceeding at a rate of speed between 3 and 4 miles an hour, would that in your opinion make it dangerous? A. Yes, to go into a lock that fast.

Q. Assume, if you will, you were bringing a tow such as that into that lock, in that position, and the starboard side of the head barge started grazing that wall, what if anything would you do? A. Grazing the wall, glide upon it, it is clear you can slide along, if not you have to take some means to pull away or stop the tow.

Q. What means would you take to keep the tow from grazing along the wall, if you knew there was a sluiceway ahead near the gate? A. The port hawser could be slackened; back up against the tow, and stop. You could throw the stern of the tug on the other side of the lock. 374

Q. What speed have you been in the habit of operating locks, and landing along the guide wall? A. Generally about a mile to a mile and a half an hour.

Q. When you get them into the wall, you drift them into the lock? A. Yes.

Q. Although the lock is made ready for you? A. Yes.

CROSS EXAMINATION BY MR. LENAHAN:

Q. Did you ever attempt to bring them in on a jingle? A. That depends. If you see they are going to hit something, you can use a jingle to pull them clear. 375

Q. There is no set rule of bringing barges into a lock, is there? A. No, sir.

Q. You don't know when they are going to take a dive one way or another? A. No.

Q. When they do, you are liable to have to use a jingle? A. Sometimes.

Q. Now, you said in a tow of barges—three barge canal boats, tight, going at a rate of 3½ to

4 miles, if they struck that wall in the manner indicated on this chart, there is liable to be some damage to the bow of that barge? A. It seems likely there would be.

Q. You know well there would be, don't you? A. When you first asked the question, if this is the proper way to bring it in, you asked a question just whether you were going into the lock or land the tow outside—if you are going to land outside, that method is all right.

Q. If you are going to land on the east side—
877 either side? A. No, it would be all right for the east side but not the west side.

Q. What is the difference? A. You are going to land them over here. There would be half—

Q. Is not the current set in this north wall? A. Yes, when the river is running, but I do not know the direction of the river at that time.

Q. It was testified that the current was running ¾ of a mile an hour. Would not that set them right over there? A. It would have a tendency to set them over a little, yes.

Q. You scraped along these lock walls where ther have been sluiceways, haven't you? A. Yes.

878 Q. Did you operate barges with round bow corners? A. I have towed barges like that.

Q. You let them rub along the wall? A. Yes.

Q. By sluiceways? A. Why, they rub, yes.

Q. They rub by the sluiceway, don't they? A. Yes.

Q. The round corners go right by? A. If not at too much of an angle that they got.

Q. If there is too much, can they get in? A. They can hit the corner.

Q. What corner? A. The bow corner.

Q. Haven't they room? A. They can hit a sluiceway though.

Q. I am asking you if you never put the starboard bow or port bow of this forward barge, with round corners, up against a guide wall or approach wall and let them run along and let them slide by the sluiceway? A. Yes.

The Chairman: Have you ever attempted to slide a boat along the wall at a 60 degree angle, with sluiceways?

The Witness: No, not where there was a sluiceway. 380

REDIRECT EXAMINATION BY MR. OTTO:

Q. You say there is no set rule as to landing a tow on a guide wall—is it not the rule to land them in the safest possible manner? A. Yes..

Q. Does a rate of speed in excess of that which you testified to before, indicate in your opinion a safe manner? A. No, I don't think it would be.

Q. In landing at an angle, or permitting them to scrape some 30 to 50 feet at an angle—is that in your opinion safe? A. No.

Q. When a tug is towing barges of this kind at 381
any speed, and the tug suddenly slows up, what happens to the tow with respect to sagging? A. They generally take a sheer one way or the other.

Q. That is quite common? A. Yes.

Q. As a matter of fact, a competent captain or pilot expects it when he slows up, doesn't he? A. Yes.

Q. If I told you the water on that level was 2 feet below normal, would that in your opinion indicate any current which might affect in any way the

382 *Roy Oatman. Called by Libellant. Recross.*

navigation of a tug and tow? A. If it were 2 feet below normal, I do not think there would be current enough there to bother any.

Q. Would a 10-foot sluiceway in any way affect the condition of the water between the bullnose and the pier in this Troy lock, as you know it? A. No, I do not think it would.

RECROSS EXAMINATION BY MR. LENAHAN:

Q. Do you mean to say, if you have your tug hooked up, and ringing down one bell, to put her under a slow bell, your tow takes a sheer? A. Most
383 generally, yes.

Q. When you go from slow to high, or high to slow—or are you talking about when— A. No, when they hook up from slow.

Q. Why? A. I don't know, but they generally do, sometimes not.

Q. How long have you been watching them do this? A. I have noticed it happen ever since I have been on the steamboats.

Q. If you are going at your ordinary normal full speed ahead, you are straining on your hawsers? A. Yes.

Q. If you slow your tug down, you don't take the
384 strain off, if you have them on two short hawsers? A. You don't take it all off.

Q. You still have a strain? A. Yes.

Q. Why should they sheer? A. I don't know.

Q. But they do sheer? A. Yes.

Q. Even when the sawsers are not slackened any? A. They do not necessarily have to slacken into the water to make them sheer.

The blueprint map is marked Exhibit A R C.

Mr. Otto: I rest.

Mr. Lenahan: Well, we have more evidence, but it's only custom, and so we will rest, too. I am willing to sum up now.

Mr. Lenahan: The charge here, it develops now, you want to bear in mind the Marine Transit Corporation is a private carrier. It does not hold itself out as a public carrier, and you should not hold us to that degree of care to which you hold a railroad company, and I presume you gentlemen are probably just as well acquainted with that principle as I, so I will pass it. In order to hold a private carrier at fault, the cargo owner has got to show negligence in some respect or another. Now, at the start of this case, I gave a notice to produce an insurance loan receipt, and for a reason which might have been known to you gentlemen at the time, I proved that this barge—all of the barges—the six that came down in tow of the Express, and the tug Gerald A. Fagan—that the owner, the Marine Transit Corporation, had used that amount of care which the ordinary reasonable man is admitted to use in the conduct of his business, to put this barge in a seaworthy condition; and I say to you, that when this insurance carrier, who is the only party at present interested here in the recovery on his policy, fixed his rate, he did that, knowing full well that a private carrier is not responsible for the negligence of his men, if he has used due diligence to make this vessel seaworthy at the time they loaded the cargo; and so I say to you that the premium which the carrier received, and the policy he issued, he did with his eyes fully open, and he did it knowing full well that the

388 law of the United States says that under these conditions, the carrier is not liable for the negligence of any member of the crew, either of the barges or the tub, and there is a reason for that. It is not like a building operator, it is not like running a manufacturing industry. There the matter is constantly under your eyes or under the eyes of some executives. Here a carrier has no control after they once leave the port of shipment, until they arrive at the port of destination, and so that is the reason that has crept into the law of this country. The
389 same applies in like manner to what we call the Limitation of Liability Act. But you can pass by that, if you want to, and on the evidence presented here, I will try this case on the evidence that Dreyfus has presented here, and on that evidence alone he is attempting to show that we brought this barge in wrong. I will even grant, for a moment—although I did not bring them in—I will even grant, as he says, although the law of physics is against some of his assertions, as certainly we could not bring a boat 110 feet long into a space 45 feet wide at an angle of 60 degrees, as she would have
390 been jammed sideways long before we reached this point. But I would say that we did bring them in wrong, for the sake of argument, and I say that we did hit this lock wall here, and I say that we hit it, as he said we hit it, 18 to 30 feet, according to various estimates of his witnesses, and that we started to slide along the wall. Now, on that point I will argue simply from his own testimony, that there was no damage done when we hit that wall. All of the

witnesses admit that the damage was done when we hit the sluiceway. I think we could concede that amongst ourselves. I do not think there is any claim to the contrary. The first point is we could not have hit the wall 30 or 18 feet from the sluiceway, at a speed of 3½ or 4 miles an hour—and that is about the maximum speed the vessel can make through the water—and if we did hit this concrete wall at a speed of 3½ to 4 miles an hour, this wooden barge, with 4 inch planking—it is almost an inevitable conclusion, we would never have to 392
wait until we got to the sluiceway for the barge to commence to leak. She probably would never have reached the sluiceway. So I said, and Captain Wentworth said, we slowed down when ~~we got~~ inside the guide wall. He tried to bring out from Mr. Whalen that we were coming at an excessive speed, and Mr. Whalen said we were coming at a slow speed. There has been no evidence put in here as to anything in our navigation that was excessive, and I would say we hit that lock wall—as Captain McGowan told us, at a speed of about 1 mile an hour. Now, say we hit it wrong, and we 393
slid along. If Mr. Whalen has been on that lock for 16 years—if I remember his testimony correctly—and he said he watched it, he expected it to come along, he did not expect it to stop at this sluiceway, and when it did stop he was the most surprised man in the world. It was in connection with his testimony and on our theory of this case, that I produced Mr. Hildebrandt here, and I also brought it out from Captain McGowan, that the hole in the

394 boat was down at the bottom. The side of this boat is absolutely perpendicular, pushed in maybe a little at the bottom, from my own knowledge, but there is no testimony—and the testimony of the lock—of the engineer of the United States Engineer's Department, Major Myton—is that the wall is perpendicular. Now, it seems to me, beyond any doubt, that if this perpendicular surface of 12 or 14 feet should hit that corner there, which is also perpendicular, that there should be damage not confined to one small little space, it should be
395 damage which should show almost over the entire head of the vessel. And this last testimony, brought out from Mr. Hildebrandt, the barge was less than 10 feet something at the stern—9 feet at the side—I suppose that was to show she would hit on the bottom, but that small difference in depth at the bow and stern, spread over 14 feet, would be very minute, and even taking that on his own argument, if we would enter into it, why it would be the very bottom of the bow which would have been damaged, and not at a point 2½ feet from the bottom. So I say to you, bearing these facts in
396 mind, the fact that Mr. Whalen stated that this sluiceway is used to carry away debris and floating logs, and that they ordinarily examine it every day to see that nothing gets jammed in there—and if I remember his testimony correctly, he said it did not go all the way to the bottom, but that the sluiceway extended down a distance—an opening of about 10 feet. So the irresistible conclusion, from the nature of the damage to a barge of her construction, the

397

fact that the wall is absolutely perpendicular, leads to only one conclusion, and before I tell you the conclusion, I want to explain something else. We all have some idea of construction of barges. Every part is joined together like any vessel, and a blow to any part of the surface of that barge will always react in the corners, in the openings of seams; in other words, everything is so joined together that the strain has to be imparted to other parts of the vessel, and that is true except where something punctures a vessel. If there is some sharp object that punctures a vessel, it will just shove a hole in her, and the vessel will break it off and slide by.

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I want you to bear in mind the only testimony in this case—Mr. Hildebrandt testified, a man who has been in the drydock business fifty years, probably the most experienced barge builder in New York, wholly disinterested, because, as he said, he repaired the vessel for this man who bought the boat in a sunken condition—told us exactly what kind of a hole was in the bow of this barge, and that was located at a distance on the starboard bow, starting a foot and a half from the bottom and extending up 2½ or 3 feet. There was not another sign of damage on that starboard bow, and I say, bearing that in mind, the irresistible conclusion is there must have been something protruding from that spillway or sluiceway, that when this barge rubbed along she must have caught into it and stopped; and I asked Mr. Whalen that question—and you sustained the objection—and I asked—and we

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can just as well draw the inference that Mr. Whalen was surprised the vessel stopped. He had seen other barges. Every witness who took the stand here had to—so unwillingly, so reluctantly, but they had to admit that this rounded bow barge—they have all seen them—with their bow up against this wall—they have all seen them slide along, they have seen them slide along this sluiceway by these recesses, as they call them, in to the lock. We say they cause damage, yes, they do cause damage, they do not cause sinkings, they do cause damage
401 though, in that they tear off the irons and they rack up the respective bow sides of the vessel, and in that way we say they cause damage. We do not contend they cause sinkings. Now, that, I say, should be the conclusion, as I see it, from this case. But from my case, as I presented it, I say we are not even at fault for the barge striking this guide wall, which they had a right to do, and I will not rely on my testimony, I will rely on Mr. Otto's. He put Mr. Whalen on the stand. He was not on the payroll of the Marine Transit Corporation. The
402 barge Ryan's testimony shows she was chartered by the Marine Transit Corporation from outside people, and I asked Mr. Whalen, I said to him, "I will ask you a frank question, I want a frank answer", and I said "Did you see anything in the navigation of that tug, at the time they were inside of that bullnose, at a distance of 100 feet, that you could say caused this vessel to sheer?", and he said "No".

Now, we are dealing with this Government Lock at Troy just the same as other locks along

the Erie Canal. Most are built with a dam on one side, and that is where the lift is or the drop-down, and this is no different, except that here there was always a certain amount of current. The Mohawk River empties into the Hudson five or six miles above this dam. The North River comes down, joins the Mohawk at Waterford, and flows down together the remaining six miles. The lock and the approach wall are built at an angle to the set of the stream. The sluiceway in there, for whatever purpose it was built, certainly does cause some suction 404
or danger to that side. Barges coming into this narrow confined place cause a certain amount of displacement, the lock being empty before the fleet arrives and being filled up again causes a certain amount of backwash, and so the navigation of this Canal, without doubt—probably you gentlemen know as well as I—has been followed by a tremendous amount of danger, and this question of sheer is no new or knotty problem. What causes it in a given instance is hard to say, whether it is just on account of the nature of the valves down here in the lock, or the subsequent action of 405
the closing of the valves and the fleet arriving in a confined place with a certain amount of displacement, whether it is the Ford Plant starting up or opening up its valves, which causes some disturbance in the water there, I must confess I must admit I do not know, but as I do say, as Major Myton said and admitted that first, that the flow of the stream of this river sets against this guide wall, since he admitted the Ford Plant contributed some draw. He admitted also that the closing of

the throttle of the valves causes some draw or suction, and he also admitted that the entrance of the barge drawing 8 to 10 feet, 110 to 112 feet long, or a total length of 324 feet, and the tug itself, caused a certain amount of displacement, and all these things nobody can put their finger on it. Maybe, two or three happen at the same time. I confess I do not know. The captain of the tug, an honest man, no longer in the employ of the Marine Transit Corporation, stated that he was coming in there. These three barges were following
407 straight behind. Even Captain Wentworth admits the same thing absolutely—three barges straight behind. They were coming along fine. The tug was headed straight for the lock, and the barges followed right in line with the tug. Then, without change of course on the part of the tugboat, and their witness admits that, something gave the tug a sheer. We are not liable for something. We are liable, and the burden of proof in the last analysis is on the libellant. We are liable for some overt act of omission or commission, and what we say is, you point out where we committed some act or
408 omitted to do some act at the time when he says this barge took a sheer, and if he points that out in the evidence, then we are liable, but his failure to do that, and if he takes his own testimony, and he is bound by his own testimony —if he takes the testimony of Captain Wentworth, the same gentleman, then you have got to dismiss this proposition against the Marine Transit Corporation, and I tell you again, gentlemen, that if you do find that this barge did

go over against the wall, and that they did go over against a wall through the negligence of this carrier, then you have got to go a step further, you have to find how this damage occurred, and in finding out how the damage occurred, I want you to revert to the testimony which I reviewed when I opened this summation, and that is that this damage was confined to the starboard bow of this barge to a very small portion of it, and that she had a hole knocked into her, and that there was no crushing to the side which would follow naturally from her hitting such a hard substance 410
as a corner of a concrete wall. There is no evidence here that the supporting timbers that held this 4 inch bow planking in place—that any of these were crushed in. The evidence is —and uncontradicted—that she had a hole punched into her, and when we think of a hole being pushed into a vessel, we think of some protruding object, or coming into sharp contact with something like heavy ice, or hitting a burden that is protruding somewhere—something like that—and gentlemen, I don't want you to forget that the only conclusion that can be reached is the fact that there was driftwood, 411
some kind of a heavy submerged floating log, got in that sluiceway, and when you come to that conclusion, do not deal with inferences that that is impossible, because Mr. Whalen told us that practically every day they go down there to see if the sluiceway is kept clear, and on the day in question he said he did not remember whether he or the other locktender went down or not.

I thank you.

412 *Libellant's Summation.*

Mr. Otto: Mr. Chairman and gentlemen of the Committee: my friend Mr. Lenahan has tried to make out, by argument, a lot that he has been unable to obtain witnesses to testify to, in support of his case. Is the mate of the tug Fagan in this room—Mr. Flynn? I am very sorry that my friend has not called for the mate of the tug, who was at the wheel at the time the accident occurred. He is here. They have been able to get him. The only presumption that arises from the failure to call him as
413 a necessary witness, is that if called his testimony would have been adverse. I am sorry, as there were a few questions I might have asked. My friend has just said that if we are unable to explain how this accident happened, that the Marine Transit Corporation is not liable. I differ with him in this respect—I believe that it is the burden of the carrier to either deliver the cargo or to satisfactorily explain that its failure to so deliver was not caused by any fault or negligence on his part. The burden of proof in that connection is with the carrier.

414 Now, with respect to the witnesses, you appreciate undoubtedly that Louis Dreyfus & Company had no persons representing them on this fleet of boats at the time of this accident. It was therefore necessary for me to investigate the matter and to find such witnesses as might come for them or whom I might get by a subpoena issued by the United States District Court. The witnesses, employees of the Marine Transit Corporation, or people from whom they chartered these boats, undoubtedly could be readily procured by them. I have

taken the liberty, and I think the daring, to go right into the enemy's tent, get the witnesses whom they should have called—called them myself and taken the risk that their testimony might—that this might prejudice or penalize or otherwise their testimony may be other than that which I may have expected from them. I also went to the trouble and expense of calling the United States Government employee at Troy, certainly a disinterested witness, to tell you what he knew. Major Myton has testified quite at length, somewhat informally, without any leading or guiding from me, answered your questions fully, and I believe the effect of his testimony has shown the following: First, that there was no current, or practically no current at this place in the approach to the lock where this accident happened. At another place, over the dam, he said the current was a mile or a mile and a half, the current above one-half of that, if I remember correctly, at the place where we are interested there was no current or practically no current; that the water on the day of the accident was 2 feet below normal. It is quite significant, that testimony, because 2 feet below normal means that the water going over the dam was only about 4 or 5 inches, instead of 2 feet which is the normal. Furthermore, it is the duty of the captain of the tug to know water conditions, to know the currents, etc., and to make due allowance accordingly. Therefore, if they fail in that respect it is negligence on their part. Now, you have seen and you have also heard Major Myton say that over 100,000 boats cleared through this lock without

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any sinkings, before this. That in his opinion, the lock is a safe place to navigate; that even after this disaster occurred, he made no recommendation to change that condition one bit. It indicates the courage of his convictions and the strength of his opinion that it is a safe place, assuming, of course, that, which we may reasonably expect, navigators will use proper diligence in approaching the lock. I believe he has also testified that over 10,000 boats of all types passed through this lock during the same year—1928. That this was the first sinking in 419 the lock since the lock was constructed in 1915, all of which certainly proves this is not an inherently dangerous place, or we would have a lot more of them. You have seen a picture of this sluiceway, but it seems that you could see this place with the naked eye. You have heard the testimony that this accident occurred in broad daylight, about 5 o'clock, visibility good. You could see these conditions, so there was no danger which ordinary prudence might not have seen and prevented. You have further heard the testimony of the captain of the barge, subpoenaed by us, Captain Went- 420 worth—who was on the bow of the boat that sunk, testify as to the position of these boats when they approached the lock, testified that this was the position as indicated by the map. You have also heard the corroborating testimony of Mr. Pickett, the Government employee whom I telephoned to last night, between 6 and 7 o'clock, to come down so that you could hear his story, as it was only last night that Mr. Myton told me that Mr. Pickett was in a position to see the thing in a better light,

421

better position than any other witness. I thought I would call him that you might get the benefit of his testimony. He has come, you have heard his testimony to the effect that this tow was lined up as this picture describes—that this tow was lined up in this fashion, although he had seen no other tow lined up in that way before, and he has been there 11 years, say that it is his duty to lock them through every day. He also corroborates the tub having put in a jingle. You heard him use the word "jingle". You have heard Captain 422
Crossen, the expert whom we called, the employee of the Pennsylvania Railroad twenty-five years, who testified in many courts before as an expert—my friend Mr. Lenahan has used him as an expert—testify to what a jingle was, and that this hook-up, the way the tow was coming in, was an improper way to land the boats. That he would not have done it. That after he saw the boats scraping, he would have backed up instead of going full speed ahead, which only caused the bow of the boat to hit with more violence and cause the sinking. It is a remarkable story I am putting out. You 423
heard the testimony of Captain Wentworth, who said right after he struck there was a jar, and one of the vertical planks came shooting right out of the water, which he reckoned to off his boat. Something has been said by Mr. Lenahan—no evidence produced by merely conjecture and argument—that there may have been some driftwood. How can he explain that this boat struck this sluiceway with the violence that caused the jarring, with the violence that caused a plank to come up? Captain Mc-

Gowan has been called by the carrier as their witness. Mr. McGowan testified, I believe, as follows: that he is captain of the boat, he was off duty, expected to go on watch in about an hour, and he had been off duty since 12. Worked 6 to 12 noon, and this thing happened at 5, still he was on deck. He saw everything, how it first struck the sluiceway—that is his testimony. All the witnesses I have called, State employees as well as the barge captain, Captain Wentworth, some say I think 30, some 40, some 50—but there is no question but that the boat did strike the upper guide wall at an angle, then scraped along slowly before it came violently in contact with this sluiceway so as to cause several planks to come off and water to come into the boat and to sink only about 20 or more feet away after she got in the lock. There must have been some violence to cause a boat to sink so quickly after she struck. Captain McGowan was asked several questions by me. I asked him whether this was the first trip he made through this lock with this boat. I believe you will recall he testified that it was. I asked him whether he knew the water conditions on that day, and the testimony, as here presented by experts as well as lay witnesses, indicate that that is an important question. It is the duty of a captain of a steamboat to know water conditions, as you can readily appreciate it. He stated he did not recall, didn't know. I asked him whether he knew the current—didn't know. I asked him whether he knew the steering apparatus was not set up for steering on the barges—he didn't

know, although I believe you have heard the testimony that it is the duty of the captain to make up the tow and to make it up safely. It further shows then the sole responsibility for the safe navigation of this tow was upon the tug as there is nothing the barge could do for steering, as there was no apparatus set up. Further there were two short hawsers which gave very little change. Now, you have heard that this tow approached the lock at an angle which is at an improper angle of approach. You have heard that this tow was speeding at 428
a fast rate of speed. Captain Wentworth, without contradiction, I believe, testified that the tow was proceeding about 3½ to 4 miles an hour, which is quite an excessive speed, and Captain Oatman, a captain on the Canal for I believe nine years, has been through the locks about ten times each year, his testimony is that a mile and a quarter would be safe. Now, I believe the trouble in this case, although I naturally was not there, but from the story as I get it, witnesses' testimony—experts advise—is that this tow was proceeding at a fast rate of speed, until it was pretty close to the lock, 429
until it realized it was pretty close to the lock. Then suddenly it saw itself in danger, slowed down, but a little too late and three loaded barges in tow, with all that momentum, would keep coming even after the tug might stop or slow down. The tug either slowed down or practically stopped. After she got pretty close to the lock, Captain Wentworth said, I believe, 80 to 100 feet south of the bullnose to the approach of the lock, the effect of that sudden

slowing down or stopping is to lose control of the tow, which as Captain Crossen and Captain Oatman testified, allowed a slacken of the hawsers that caused the boats to go either way. In this case, the head barge went to the starboard, the right side. She scraped, then she scraped for quite a distance, but I believe it was negligence from the fact that the tug proceeded at an excessive rate of speed and did not slow down until it was in a dangerous position and too late to do so with safety to its tow. I believe the tug is negligent for, having
431 once seen this boat sheer after causing it to slacken the hawser and slow down, it did nothing to corret it. It allowed this barge to drag this guide wall for a distance varying from 30 to 60 feet or so. Then, when she was right up to the sluiceway, instead of then stopping and backing up, she put full speed ahead, increasing the violence with which this boat struck the sluiceway. You have heard the testimony of Captain McGowan, their main witness, who admitted there was no unusual condition with respect to the navigation on the day in question. If there was no unusual condi-
432 tion existing with respect to the navigation on the date of the accident, then what caused it? The tug captain is supposed to have a certain amount of skill, he has in his custody considerable property, valuables as well as lives. Captain Wentworth in this case, I believe, had two daughters on his boat and there is a responsibility attached to a captain of a tug, a certain amount of experience he is supposed to have. He is supposed to know conditions which

are ordinarily to be faced in the navigation of boats, so he may guard against them, but adds almost insult to injury, without any provocation, so far as has been brought out—and this is the end of the case—without any provocation, clear day, broad daylight, visibility good, water conditions low, practically no current, etc.—this boat was allowed to strike and sink. The only conclusion that may be drawn from it is that there was negligence somewhere in the navigation. I have pointed out specifically in what respect. It is only necessary, in my 434
opinion, to prove one specification of negligence, but I think I have proven a number of specifications of negligence. You have also heard Captain Wentworth testify that he called to the deckhand of the tug and asked him to slacken the hawser—I think the port hawser—and that the deckhand didn't do it. That the deckhand told him, right after the accident, that he couldn't do it unless he was told to do it. Where was the mate—what was he doing—was he paying particular attention to the work? If so, why didn't he attend it. The boats may sheer, but if they do sheer, if 435
boats are drifting and they are supposed to drift in without very much headway or momentum, it is a simple thing to back up and straighten them out or pull a little harder on the one hawser and straighten them out, but if they are coming at a pretty good speed, it is equivalent to a truck or three tractors coming at a pretty fast rate of speed and suddenly without excuse trying to stop—something is going to happen.

436 *Libellant's Summation.*

Mr. Lenahan has been frank to say that he did not know what happened—what caused it—and in answer to the libel, Mr. Lenahan set up a defense that indiscernible current caused it. Therefore, I directed a good bit of evidence or proofs to prove that there was no current, or practically none, and that a current didn't do it. That is the only explanation that he made, because his answer was—he said the only explanation was that some indiscernible current caused this boat to do what it did do—to
437 sheer. With the water conditions as I have enumerated, conditions of navigation safer than usual, I believe it was not only the ordinary negligence, which necessarily must be established to win, but I believe there is gross negligence, I do not think in the first place they did anything to prevent it, and after seeing themselves in a dangerous position they did not use good judgment to get them out of it.

Now the charterparty provides that the carrier shall be liable for his negligence or fault, so the question is whether the carrier is negligent or not. If the carrier is negligent, we
438 expect your Committee to give us the award. Of course, if you find the carrier is not negligent, your award should go to the carrier. As I said in my opinion, Mr. Lenahan has tried by his argument to prove things which he has not called witnesses, in the usual course, to prove, which would have, of course, allowed me the right or privilege of cross examination and an opportunity to dispel any inference which you might otherwise have to draw.

I thank this Committee for the consideration they have given me, the courteous treatment, and I await your award with confidence.

Dreyfus' Exhibit 1. 439

John D. Schoonmaker, President — Gerald A. Fagan, Vice-President

MARINE TRANSIT CORPORATION
Lighterage—Towage
17 Battery Place
New York City

Telephone
Whitehall
7576
7577
7578

Boxes
Scows
Derrick
Covered
Barges 440

August 17, 1928.

WE HAVE THIS DAY CONFIRMED BOOKING, CANAL FREIGHT:

BETWEEN: Marine Transit Corporation, Owners or Agents

AND: Louis Dreyfus & Company, Charterers.

THAT the said Owners or Agents will furnish Insurable Canal Tonnage, for grain, as below:

QUANTITY: Two fleets, about 200,000 Bushels Wheat. 441

PORT OF LOADING: Buffalo, N. Y.

DATE OF LOADING: September 1/15, 1928.

DESTINATION: New York, N. Y.

RATE: 6¼ cents per Bushel, NET TO BOATS.

INSURANCE: CARGO AND FREIGHT, to be placed by and for account of Charterers, Carriers Liability to be placed by and for account of Owners or Agents.

442 OTHER TERMS: Subject to New York Produce Exchange Canal Grain Charter Party No. 1 as amended.

MARINE TRANSIT CORPORATION
Owners or Agents
GERALD A. FAGAN

LOUIS DREYFUS & COMPANY
Charterers
J. G. BENNETT

443

444

Dreyfus' Exhibit 2. 445

NEW YORK PRODUCE EXCHANGE
Canal Grain Charter Party No. 1

(Adopted by the members of the Grain Trade of the New York Produce Exchange at a meeting held May 12, 1924, and approved by the Board of Managers of the New York Produce Exchange May 23, 1924)

Amended August 6, 1925, April 1, 1926, March 22, 1928.

IT IS THIS DAY MUTUALLY AGREED 446

Between .....
(Owners or Agents)

and .....
(Charterers)

That the said Owners or Agents will furnish insurable Canal tonnage for grain as below

QUANTITY

..... bushels of .....

PORT OF LOADING 447

.....

.....

DATE OF LOADING

.....Loading between ..... and .....

.....

Unless otherwise agreed boats must be tendered at loading port properly passed by the surveyors

448 for underwriters as being ready to load between the hours of 9 A. M. and 5 P. M., but if boat or boats tendered are seaworthy and are properly passed on arrival of said surveyor, then if boat or boats have tendered within contract period, no penalty is collectible by charterer.

DESTINATION

.....

RATE

.....cents per bushel of .....
449 pounds, delivered weight, exclusive of elevation at ports of loading, but including trimming, transportation to destination, and delivery at any point accessible by water within the free lighterage limits of New York Harbour, except deliveries to New town Creek and Gowanus Canal, which shall be subject to additional towing charges to cover cost of movement between mouth of Newtown Creek and destination and Court Street and destination.

INSURANCE

Unless specifically excluded at time of charter ing Freight Rate includes Marine Insurance on cargo, freight and import duty, if any, which is to
450 be covered by Charterer and premium to be deducted from the freight. Amounts insured to be reported to the Underwriters separately as follows:

1—Value of merchandise (including elevation and costs, if any) figured at market value of merchandise at loading port at time of loading plus 5%. In case of disagreement value to be fixed by the Grain Committee of the New York Produce Exchange, which will be final.
Any additional value desired may be placed by charterers at their expense.

2—Duty, if any. 451

3—Freight.

Insurance covering Carriers Legal Liability must be placed by Carriers at their own expense, proper binder to be furnished Charterers if requested.

GENERAL AVERAGE

General Average and/or salvage charges to be adjusted according to the rules and customs of the Port of New York.

BONDS

452

Canal Companies to clear all United States Government T&E Bonds.

Owners of the grain must notify carriers in writing when ordering bonded grain from elevator. In absence of such notice from the owners of the grain, the owners will assume any penalties imposed upon the carriers by the Government.

WHARFAGE CHARGES

Canal Companies to pay customary wharfage charges, if any, in New York Harbor.

If charterer orders grain to steamer before permitted by said steamer he shall be liable for any wharfage charges incurred at ship's side until beginning of time permitted by steamer. 453

DEMURRAGE

A. The Charterer (or his agent or assigns) is to be entitled to three (3) days, exclusive of Sundays and legal holidays (Saturday afternoon not to be construed as a holiday) to unload. Official written notice of arrival at 53rd Street, North River, or other canal termination south thereof (unless advance orders have been placed) must be delivered

454 to Charterer (or his agent or assigns), free time to commence from the first 12 o'clock noon, New York City time, following delivery of such notice. At the expiration of free time period, the demurrage rate shall be four (4) cents per ton of 2000 lbs. per day on actual amount of grain loaded into boats.

B. Boats shall have the option to discharge on arrival (if orders have not been filed) into a public elevator at their own expense, and give free lighterage outward to final delivery. Written notice of such intention to discharge shall be given Charterer twenty-four (24) hours prior to ordering to such elevator. Storage at the rate of .1/20c. per bushel
455 per day is to be paid by Charterers after three (3) days' free time has elapsed. Insurance is to be covered by owners of the grain. Charterer (or his agent or assigns) is to be entitled to as many delivery orders as there were boats delivered to elevator for his account, insurance risk for any lighterage delivery from elevator to be assumed by owners of grain, or order to be for less than 8,000 bushels, unless extra expense due to smaller quantity is paid by Charterer, and no credit to be given for any unused portion of this privilege.

Carriers shall have further option of transferring cargoes to other insurable barges (boat for boat)
456 instead of to a public elevator under conditions of paragraph next above, except that demurrage rates applying to original barges, shall apply in place of designated elevator storage rate. This shall not be construed as final delivery.

C. If cargo is stored in elevator in accordance with Paragraph B above, Charterer (or his agent or assigns) shall have the option of accepting final delivery in elevator at any time prior to ordering out of same, in which case elevation and storage from date of elevation must be assumed by him.

DETENTION 457

A fleet shall consist of boat or boats, as designated by carrier at time of booking, and adequate motive power to tow the boat or boats to destination with continuous movement and under ordinary circumstances. A fleet shall sail within 24 hours of completion of loading and proceed to destination without delay, except that due to accidents, Acts of God, strikes, lockouts, fires, or rendering necessary aid to other vessels in distress or danger. Owners shall pay charterers demurrage at rate of 4c per ton of 2000 lbs. per day, or fraction thereof, for any detention at loading port beginning 24 hours after completion of loading and until beginning of voy- 458
age; also for any unnecessary (avoidable by ordinary care) delay enroute, but no demurrage is chargeable for any detention at loading port between loading dates specified in charter party if operator notifies charterer before loading that boats will not move until last date. This paragraph is not applicable to any unit less than a fleet defined above, as regards delay at port of loading but does apply otherwise.

OUTTURN:

Official weight certificates covering quantity loaded shall be conclusive as between shippers and 459
assigns and carriers as to quantity of cargo received inward and to be delivered on final delivery.

The boat owner and/or operator and/or carrier shall be responsible for all damage caused by their negligence or fault but shall not be liable for losses caused by dangers of navigation, fire or collision, except where caused by their negligence or fault. Neither shall they be liable for acts of God, quarantine or the public enemy. The carrier shall be paid in full by consignee for any excess cargo deliv-

460 ered at destination, and any shortage in delivery in excess of 1/8 of 1% of intaken weight shall be paid for by the carrier, at the market price of a like kind and grade of grain at New York on the day when shipment is delivered, and final quantity determined; these adjustments to be made in cash at time of payment of freight.

In case the grain becomes heated while in transit (such heating not being caused by leakage of boat, or heat from boiler or machinery) the Carrier shall deliver his entire cargo and collect his entire freight charges on bill of lading weights.

461 SEPARATE CHARTERS:

Each boatload (or parcel, if less than a boatload) is to be deemed a separate charter.

CANCELLATION CLAUSE:

If grain is not ready for boats when tendered within contract period, charterers will have an extension of five days at a penalty of 1/2c per bushel. If grain is not ready within this additional period, boat owners have the option of cancelling charter or rechartering; loss in freight, if any, of rechartering to be paid by charterer.

If carrier fails to tender boat or boats in contract
462 period, an extension of five days will be allowed at penalty of 1/2c per bushel. If boats are not tendered within this additional period, charterers have the option of cancelling charter or rechartering; the extra expense, if any, of rechartering to be paid by boats.

After November 5th, of each year, the options referred to in the two preceding paragraphs may be exercised at end of contract period. In such event, should the boats be unable to secure other cargo before official closing date, charterers shall be liable to them for the full amount of freight called

for in the charter party. Similarly should charterers be unable to recharter before official closing date or if able to re-charter but unable to secure insurance equal to charterers customary policy, boats shall be liable for the extra cost of delivery to destination via railroad.

PAYMENT OF FREIGHT:

80% of the total freight is due and payable on arrival of boats at Destination, the balance, together with demurrage and towing and/or other proper charges is due and payable after delivery has been made and actual outturn weights ascertained, subject to deduction of shortage allowances, or other substantiated claims under this particular charter.

If shortage amounts to more than 20%, carrier shall refund to the cargo owner any freight paid on any shortage in excess of said 20%.

Freight is guaranteed and payable vessel or cargo lost or not lost.

In the event of loss or damage which requires return of cargo to the point of shipment or the discharge of cargo at any intermediate point or place on the voyage the full freight thereon shall be deemed to have been earned and shall be paid accordingly, but no additional freight shall be paid on grain forwarded from point of loss or damage to destination on same voyage and in the original vessel.

TOWING:

The Charterer to be entitled to one free-delivery on each boat within the lighterage limits of New York Harbor, and to one elevator loading on a boat at loading port. The charterer shall pay for any additional tows beyond this amount at prevailing rates. This applies to canal boats arriving afloat

466 and does not affect deliveries to elevator under demurrage Clause B.

BILLS OF LADING:

Bills of lading must be issued to conform with this charter party in every respect. No additions or alterations are valid without the written consent of charterers. It is distinctly understood and must be so stated on the Canal bill of lading and the said Can bill of lading, when properly endorsed, carries full title to the property and that the issuer thereof warrants that a similar quantity and grade of grain has been cancelled from an original lake
467 bill of lading and/or elevator receipt which likewise carried full title.

If grain is billed on original lake documents through from Western lake ports to New York, the issuance of Canal bills of lading will not be required.

Original lake or canal bill of lading carrying title to the grain properly endorsed must be surrendered with orders for final delivery, and cancelled by carrier or its agent.

DISPUTES:

All disputes arising under this contract to be ar-
468 bitrated before the Committee on Grain of the New York Produce Exchange whose decision shall be final and binding.

.....
(Owner or Agent)

.....
(Charterer)

Dated 192

Dreyfus' Exhibit 3.

469

CANAL SERVICE CORP.

Date—9/13/28 Barge—Edward A. Ryan.
Ex-Lake Vessel—Pioneer Hold—3
Elevator—American
Kind of Grain—#4 Man. Wheat
Started—8.20 A. M. Finished—10.00 A. M.
Draft Pounds—30000 Bus.—500 Weights—2/8
2/9 2/2 2/1

1	2	3	4	5	6	7	8	9	10	5,000
1	2	3	4	5	6	7	8	9	10	5,000
1	2	3	4	5	6	7	8	9	10	5,000
1	2	3	4	5	6	7	8			4,000
12000 lbs. = 200 bu. # 1										200
Total Bushels										19200

470

Elevator Weighman—Masterson
Tally Man—W. C. Whalen

Dreyfus' Exhibit 4.

STATEMENT OF CLAIM

19,200 bushels #4 Manitoba wheat

471

Market value at New York City on September 25, 1928 as per records of the statisticians of the New York Produce Exchange $1.19⅞ per bushel.

19,200 bu. @ $1.19⅞	$23,016.00
Interest for 14½ months on $23,016.00 @ 6% per annum or 7¼%	1668.66
	$24684.66

472 **Dreyfus' Exhibit A.**

November 1 1928

RECEIVED from the STANDARD MARINE INSURANCE COMPANY, LIMITED, Twelve Thousand Three Hundred Ninety Six .....00/100 Dollars, as a loan and repayable only to the extent of any net recovery we may make from any carrier, bailee or others on account of loss to our property (described below) due to sinking at Troy, N. Y. on or about Sept. 25 1928 or from any insurance effected by any carrier, bailee or others on said property, and, as security for such repayment we hereby pledge to the said STANDARD MARINE INSURANCE COMPANY, LIMITED, the said recovery and deliver to them duly endorsed the Bills of Lading for said property, and we agree to enter and prosecute suit against said Railroad, carrier, bailee, or others on said claim, with all due diligence at the expense and under the exclusive direction and control of the said STANDARD MARINE INSURANCE COMPANY, LIMITED.

478

Per pro LOUIS DREYFUS & Co.
(Signature illegible)

$12396.00

474

Description of property:
Wheat

Dreyfus' Exhibit B. 475

No. L. R. 9842

By endorsement hereof, the payee acknowledges having received the amount of this draft as a loan for loss as described.

Nov. 5th, 1928.

This Draft Is to Be Presented to

CHUBB & SON 476
Managers and/or General Agents

at

THE NATIONAL CITY BANK OF NEW YORK

Pay the sum of Twelve Thousand Three Hundred Ninety Six .....00/100 Dollars to the order of LOUIS DREYFUS & COMPANY.

$12,396.00

c/o Otto & Company, Inc.,
2 Broadway,
New York City. 477

CHUBB & SON,
Managers and/or General Agents,
WM. STEVENS
Attorney

478 Federal.

CHUBB & SON
5 & 7 South William Street, New York

Federal Insurance Co., of New Jersey
The Sea Insurance Co., Ltd., of Liverpool
The Marine Insurance Co., Ltd., of London
The London Assurance (Marine), of London
Alliance Assurance Co., Ltd., of London
Hartford Fire Insurance Co., of Hartford
Merchants Fire Assurance Corp. of N. Y.

Claim for—T/L—Wheat
479 Steamer—Barge E. A. Ryan
Voyage—Buffalo to New York.
Accident—9/25/28. Barge in collision and sank.
Charge—Losses.
Marks & Numbers—#4
Our Claim No.—28—7536
Checked by—R. H. K.
Examined by—
C A H
10/2/28

By endorsement on the back hereof, the payee of the above draft acknowledges having received from
480 CHUBB & SON, Managers and/or General Agents, the amount thereof, as a loan, repayable only to the extent of any net recovery the payee may make from any vessel, carrier, Bailee or others, upon or by reason of any claim for loss of or damage to the property described in the margin hereof, or from any insurance effected by the payee or by any carrier, bailee, or others on said property, and as security for such repayment, the payee hereby pledges to the said managers and/or general agents all such claims and any recovery thereon.

The payee hereby appoints the said managers 481
and/or general agents, and their successors, severally, the payee's agents and attorneys in fact, with irrevocable power to collect any such claim, and to begin, prosecute, compromise or withdraw, in the payee's name, but at the expense of said managers and/or general agents, any and all legal proceedings which they may deem necessary to enforce such claim or claims, and to execute, in the payee's name, any documents which may be necessary to carry into effect the purposes of this agreement.

In further consideration of the said advance, the payee hereby guarantees that the payee is the person entitled to enforce the terms of the contract of 482
transportation set forth in the bills of lading covering the said property.

(On Side)

Draft Will Not Be Paid If Detached From Receipt

(Stamped on Face)

PAID
Inter Office Cash
Nov. 8—1928
Chubb & Son, Mgrs.
Check F. L. D.

483

(B. A.
Teller 5
8)

RECEIVED PAYMENT
Through New York Clearing House
Prior Endorsements Guaranteed
Nov 7 1928
THE BANK OF AMERICA
National Association
New York, N. Y.
Charles E. Curtis, Cashier

484 **Marine Exhibit B.**

Buffalo, N. Y.
Ellicott Sq. Bldg.
Phone Seneca 4224

ALBERT R. LEE & CO., INC.
15 William Street
New York, N. Y.
Hanover 0630

No. 1068 Sept. 13, 1928

CARGO CERTIFICATE
485 Non-Negotiable

TO WHOM IT MAY CONCERN:

This is to certify that the Barge Edward A. Ryan has been inspected and found worthy to load Dry cargo within ten days from the date of this certificate, subject to policy conditions and classifications.

ALBERT R. LEE & CO., INC.
F. H. GODFREY
Surveyor

486 ORIGINAL

Marine Exhibit C. 487

BILL OF LADING

Telephone
Whitehall
1463-1464-1465

Towage
Lighterage
Freighting

MARINE TRANSIT CORPORATION
United States Custom Bonded
17 Battery Place
New York City

Sept. 13, 1928 488

Received at Buffalo, N. Y. on board barge E A Ryan the cargo herein described in apparent good order, except as noted, shipper's weight (weight, quality, condition and value unknown) to be delivered in like order and condition (Acts of God, Perils of the Inland Waters, fires, explosion bursting of boilers or breakage of shafts stranding or collision excepted) upon payment of the freight and charges as per freight bill immediately upon notification of arrival of vessel at destination herein. No liability shall be assumed hereunder before loading or after discharge of cargo. This shipment is carried subject to all terms and conditions of Section 3 (only) of the Harter Act (Section 8031 U. S. Compiled Statutes 1918) and of all other Statutes of the United States according carriers by water the protection of Limited Liability. If due diligence shall have been exercised to make the vessel seaworthy no liability shall attach to this carrier on account of losses due to excepted perils or from latent defects or unseaworthiness or from prolongation of the voyage. Approval of vessels by surveyors representing cargo interest prior to sailing shall 489

490 be conclusive evidence of seaworthiness. If the Carrier shall have exercised due diligence to make the vessel seaworthy it is agreed that in case of danger damage or disaster resulting from faults or errors in navigation or in the management of the vessel or from any latent or other defect in the vessel or from unseaworthiness whether existing at the time of shipment or at the beginning of the voyage the Shippers Consignees Owners or Underwriters of the cargo shall nevertheless pay and salvage or special charges incurred in respect of the cargo and shall contribute with the Carrier in General Average to the payment of any sacrifices losses or
491 expenses of a General Average Nature as if such danger damage or disaster had not resulted from such fault negligence latent or other defect or unseaworthiness; General Average to be settled in accordance with the law and usage of the Port of New York. Carrying and towing vessel or vessels are to be considered one vessel for all purposes under this agreement. Carrier to have the benefit of any insurance that may have been effected upon or on account of said property in so far as this shall not void the policies or contracts of insurance. This Bill of Lading is evidence of the private contract of carriage entered into by the shipper and carrier herein and shall be considered as supplemental and
492 amendatory thereto anything in the original charter party notwithstanding. Any and all liabilities of the carrier hereunder shall be those of a private and not of a common carrier.

Ship to—Order Bank of Nova Scotia c/o Abell Fwdg. Co. Inc. Buffalo N. Y.

Ntfy L Dreyfus & Co. New York N. Y.

Ex—Str. Pioneer Hold 3. American Elev. 7/2[illegible]

Remarks—From Ft. William Ont. 7/24/28.

BOND FOR EXPORT T&E 807

Pieces	Description	Weight	493
19 200	Nineteen thousand two hundred bushels No. 4 Nor. Man. Wheat. As per Contract. Deliver only on surrender of original Lake Bill of Lading properly endorsed.		

6¼

Inv. $2704
$1200.00

Ins.

MARINE TRANSIT CORPORATION
F. J. MURPHY
Agent 494

.....
Shipper

(Samped Across Face)
COPY—NOT NEGOTIABLE

495

496 **Award.**

WHEREAS, a controversy existing between LOUIS DREYFUS & COMPANY and MARINE TRANSIT CORPORATION was, by an order of the United States District Court in and for the Southern District of New York, dated the 6th day of September, 1929, submitted by them to the Committee on Grain of the New York Produce Exchange, as Arbitrators, for their adjudication and award, as by reference to which instrument will more fully appear;

NOW, THEREFORE, the above named Arbitrators, having consented to act as such, and having duly
497 met together and deliberately heard the allegations and proofs of the said parties, do by these presents arbitrate, adjudge and award of and concerning the said controversy as follows:

The Marine Transit Corporation shall pay to Louis Dreyfus & Company $23,016.00, the loss caused through the sinking of the barge Edward A. Ryan, plus interest amounting to $1,668.66.

The costs and expenses of this arbitration $362.50 shall be paid by the Marine Transit Corporation.

498 A. C. FIELD
JAS. J. O'DONOHOE
CLAUDE N. HITCHCOCK
JAS. H. BOWNE

Witness:
A. R. CRAWFORD.

Dated New York, December 20th, 1929.

Notice of Motion to Confirm Award.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel tug GERALD A. FAGAN, its motors, equipment, etc., and the barge JOHN E. ENRIGHT, its tackle, apparel, gear, etc.

SIRS:

PLEASE TAKE NOTICE that upon the pleadings and proceedings heretofore had and upon the annexed affidavit of Henry E. Otto, sworn to on the 23rd day of December, 1929, we shall move this Court at a term thereof to be held for the hearing of motions in the Post Office Building, Borough of Manhattan, City of New York, on the 27th day of December, 1929, at 10:30 o'clock A. M. on that day or as soon thereafter as counsel can be heard for an order confirming the award of the Committee on Grain of the New York Produce Exchange under date of December 20th, 1929, or for such other and further relief

502 *Notice of Motion to Confirm Award.*

in the premises as to the Court may seem just and proper.

Dated, New York, December 23, 1929.

Yours, etc.,

OTTO & LYON,
Proctors for Libellants,
60 Broad Street,
New York City.

503 To:

MACKLIN, BROWN, LENAHAN & SPEER, Esqs.,
Proctors for Marine Transit Corp.,
Respondent-Claimant,
44 Beaver Street,
New York City.

504

Affidavit of Henry E. Otto to Confirm Award. 505

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against 506

MARINE TRANSIT CORPORATION, the Diesel tug GERALD A. FAGAN, its motors, equipment, etc., and the barge JOHN E. ENRIGHT, its tackle, apparel, gear, etc.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

HENRY E. OTTO, being duly sworn, deposes and says:

That he is a member of the firm of Otto & Lyon, proctors for libellants, and is familiar with the 507 above case.

Your deponent caused a libel to be filed on December 14, 1928 to recover in a cause of contract, collision and cargo damage for loss of shipment of grain via the New York State Barge Canal. On April 17, 1929 the firm of Macklin, Brown, Lenahan & Speer served a copy of the answer of the Marine Transit Corporation as respondent and as claimant of the diesel tug "Gerald A. Fagan." On

508 the 19th of August, 1929 motion papers returnable August 27th, 1929, were served on proctors for the Marine Transit Corporation and the proctor for the barge John E. Enright, for an order referring the dispute between the libellants and the Marine Transit Corporation and the tug Gerald A. Fagan and the barge John E. Enright to arbitration before the Committee on Grain of the New York Produce Exchange. The motion was granted by Mr. Justice Coxe, the motion papers bearing the following endorsement:

509 "Motion granted only as to the issues raised by the contract between the libellant and the Marine Transit Corporation. Settle Order or Notice."

An order granting the motion was entered the 28th day of August, 1929 but was resettled at the request of proctors for the Marine Transit Corporation, the order resettling the order of August 28th, being entered on the 6th day of September, 1929. A copy of this order is hereto attached and marked Exhibit "A".

The Committee on Grain of the New York Produce Exchange, set a date for the hearing on the
510 4th of October, but at the request of the proctors for the Marine Transit Corporation the hearing was adjourned to the 11th day of December, 1929. The matter was heard on December 11th and December 12th, 1929. On the 20th day of December, 1929 the Arbitration Committee handed down an award in Libellant's favor in the sum of $23,016 and interest amounting to $1668.66. The award is hereto attached and marked Exhibit "B".

Affidavit of Henry E. Otto to Confirm Award. 511

WHEREFORE deponent respectfully prays that the award in all respects be confirmed.

HENRY E. OTTO.

Sworn to before me this
23rd day of December, 1929.

EDWARD J. GARITY,
Notary Public,
Bronx. Co. Clk.'s No. 8, Reg. No. 3181.
Cert. filed N. Y. Co. No. 751, Reg. No. 1-G-473.
Kings Co. Clrk.'s No. 101, Reg. No. 1433. 512
Commission expires March 30, 1931.

513

514 **Exhibit "A".**

At a Stated Term of the United States District Court held in and for the Southern District of New York at the Court Rooms of said Court in the United States Court & Post Office Building, in the Borough of Manhattan, City of New York, on the 6th day of September, 1929.

Present—Honorable ALFRED C. COXE, *U. S. D. J.*

515 LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel tug GERALD A. FAGAN, its motors, equipment, etc., and the barge JOHN E. ENRIGHT, its tackle, apparel, gear, etc.

516 Upon the annexed consents and on motion of Otto & Lyon, proctors for the libellants, it is

ORDERED that the order entered herein on the 28th day of August, 1929 be resettled and amended to read as follows:

ORDERED that the said motion be and the same hereby is granted only as to the issues raised by the contract between the libellants and the Marine Transit Corporation

and it is

FURTHER ORDERED that Marine Transit Corporation submit to arbitration before the Committee on Grain of the New York Produce Exchange any and all issues under the contract dated August 17th, 1928 between Marine Transit Corporation and Louis Dreyfus & Company for the transportation of 200,000 bushels of wheat from Buffalo to New York.

ALFRED C. COXE,
U. S. D. J. 518

We hereby consent to the entry of the foregoing order and waive notice of settlement.

MACKLIN, BROWN, LENAHAN & SPEER,
Proctors for Marine Transit Corp.

THOMAS A. McDONALD,
Proctor for the barge John E. Enright.

519

520 **Exhibit "B".**

AWARD.

WHEREAS, a controversy existing between

Louis Dreyfus & Company and
Marine Transit Corporation

was, by an order of the United States District Court in and for the Southern District of New York dated the 6th day of September, 1929, submitted by them to the Committee on Grain of the New York Produce Exchange, as Arbitrators, for their adjudication and award, as by reference to which instrument will more fully appear:

521

NOW, THEREFORE, the above named Arbitrators, having consented to act as such, and having duly met together and deliberately heard the allegations and proofs of the said parties do by these presents arbitrate, adjudge and award of and concerning the said controversy as follows:

The Marine Transit Corporation shall pay to Louis Dreyfus & Company $23016.00, the loss caused through the sinking of the barge Edward A. Ryan, plus interest amounting to $1668.66.

522

The costs and expense of this arbitration $362.50 shall be paid by the Marine Transit Corporation.

Witness:
A. R. CRAWFORD.

A. C. FIELD
JAS. J. O'DONOHOE
CLAUDE N. HITCHCOCK
JAS. H. BOWNE.

Dated, New York, December 20th, 1929.

Affidavit of Richard F. Lenahan, Read in Opposition to Motion to Confirm Award. 523

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

524

against

MARINE TRANSIT CORPORATION, the Diesel Tug "GERALD A. FAGAN", and the Barge "JOHN R. ENRIGHT".

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

RICHARD F. LENAHAN, being duly sworn, deposes and says:

That he is proctor for the Marine Transit Corporation, the respondent herein and the claimant of the tug "Gerald A. Fagan"; that he has had charge of this case since its inception, is familiar with the proceedings which have been had and attended at the hearing before the Grain Committee of the Produce Exchange on the arbitration heretofore ordered by this Court on motion made by the libellant. 525

For the convenience of the Court, annexed to the affidavits herewith submitted in opposition to the

confirmation of the award of the Arbitrators in favor of the libellant, Louis Dreyfus & Company, and against the respondent, Marine Transit Corporation, in the amount of $23,016.00, plus interest amounting to $1,668.66, are copies of the pleadings. The Court will note that the libel proceeds on the theory of tort, alleging negligent navigation on the part of the tug "Gerald A. Fagan" and on the part of the barge "John E. Enright". No answer has been filed by the barge "John E. Enright", although jurisdiction has been obtained over it and it has
527 been brought into the action.

The Court will note, by referring to the order sending this matter to arbitration, copy of which is annexed to the moving papers for the confirmation of the award, that Judge Coxe directed arbitration only as to the issues raised by the contract between the libellant and Marine Transit Corporation. The libellant's cargo of grain was shipped on the barge "Edward A. Ryan" pursuant to a bill of lading and booking contract which referred to and incorporated the New York Produce Exchange Canal Grain Charter Party No. 1 as amended March 22nd, 1928. The bill of lading which was given by the Marine Transit Corporation, the carrier,
528 provided that the carrier should have the benefit of the Harter Act. The Grain Charter Party referred to, which was incorporated, by reference, provides that:

> "The boat owner and/or operator and/or carrier, shall be responsible for all damage caused by their negligence or fault, but shall not be liable for losses caused by dangers of navigation, fire or collision, except where caused by their negligence or fault."

Section 3 of the Harter Act, which is Section 192 of Title 46 of the U. S. Code, applies to private as well as common carriers and accordingly to the carriage of the libellant's cargo by the Marine Transit Corporation which was, of course, a private carrier. The Section, it is our contention, is self-executing and the Marine Transit Corporation would be entitled to the benefits of it whether specifically referred to in the carriage agreement or not. It has been definitely adjudicated in this Circuit that where the towing vessel and the barge are commonly engaged in the joint venture, the owner of 530
the tug is likewise entitled to the benefits of the Act.

The Marine Transit Corporation at the hearing before the arbitrators has offered proof which was uncontradicted that due diligence was exercised to make the barges comprising the tow and to render the tug in all respects seaworthy and properly manned, equipped and supplied. It is, accordingly, our contention that liability for the damage to the cargo could, therefore, in no event, attach to the Marine Transit Corporation.

Furthermore, the Grain Charter Party specifically provided that the boat owner, operator, or carrier "shall not be liable for losses caused by dangers of navigation * * * or collision, except where 531
caused by their negligence or fault". The testimony of the libellant's own witnesses offered at the hearing before the Grain Committee is all to the effect that the damage to the libellant's cargo was caused and occasioned by a collision or contact of the barge "Edward A. Ryan" with an opening or sluiceway in the approach wall of the Government Lock at Troy, New York, without any fault on the part of the tug or of anyone for whom the carrier

was responsible contributing in any way thereto. In order to substantiate this contention, if questioned by the libellant, it will, of course, be necessary for us to refer to the minutes of the hearing before the arbitrators. These minutes were taken by the assistant to the secretary of the Produce Exchange. They were ordered by us on December 27th, but have not as yet been supplied. The representative of our office, who, together with Mr. Otto, libellant's proctor, personally visited the stenographer and ordered the minutes, urged upon her
533 the necessity of getting them ready at an early date and explained that this motion was pending and that the minutes would be required upon the motion, as it was the intention of our office to resist the application for the confirmation of the award. The stenographer said she would do her best to get them out at an early date, but indicated that the only time that she had to do it was at night, as she had her usual duties as assistant to the secretary of the Exchange to attend to during the day. The minutes have, however, not as yet been provided.

The Committee on Grain of the Produce Ex-
534 change which is the Arbitration Board provided for in the New York Produce Exchange Canal Grain Charter Party No. 1, is a committee, deponent is informed and believes, which is appointed by the Exchange by the year. The members of it are not selected separately for each arbitration so as to secure representation on the committee of men best suited to the arbitration about to be undertaken and most likely to be impartial. The members of the committee your deponent is informed and believes and as is more fully set forth in the affidavit of Gerald A. Fagan herewith submitted, are all

associated with grain dealers and shippers, persons or companies in the same business as the libellant herein.

Furthermore, your deponent is informed and believes that Henry E. Otto, the proctor for the libellant, is an insurance broker, the president of Otto & Company, an insurance brokerage house at 2 Produce Exchange, which is the broker for the libellant and for the various companies or firms which the members of the Grain Committee are associated with.

The libellant, deponent is informed and believes, 536
is a member of the Produce Exchange, whereas the respondent and claimant, Marine Transit Corporation, is not a member of the Exchange.

Furthermore, there is no member of the Grain Committee who represents the canal carriers or is associated in business with any of the canal carriers. The Committee is solely and completely representative only of grain dealers and shippers, and only grain dealers and shippers are represented on the Committee.

Section 10 of Title 9 of the U. S. Code provides that the United States Court may vacate the award of the arbitrators: 537

> "(b) Where there was evident partiality or corruption in the arbitrators or either of them.
>
> "(d) Where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon subject matter submitted was not made."

Under the evidence submitted to the arbitrators and under the broad principles of law which they are required to take cognizance of, because of their

538 *Affidavit of Richard F. Lenahan.*

business affiliations and association in identical lines of business with the libellant and because of their business relations with the proctor for the libellant, they were evidently partial and either exceeded their powers or so imperfectly executed them that a mutual final and definite award was not made.

WHEREFORE deponent prays that the award of the arbitrators be vacated and the case which is already at issue in the District Court be allowed to proceed to trial before the Court so that respondent and
539 claimant, Marine Transit Corporation may have a fair and impartial trial of the issues.

RICHARD F. LENAHAN.

Sworn to before me this
20th day of January, 1930.

JOHN E. BROWNE,
Notary Public, Richmond County.
Cert. filed in N. Y. County No. 1326
N. Y. Co. Reg. No. 0-874
Cert. filed in Kings County No. 337
540 Kings Co. Reg. No. 662
Commission expires March 30, 1930

Affidavit of Gerald A. Fagan, Read in Opposition to Motion to Confirm Award. 541

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against 542

MARINE TRANSIT CORPORATION, the Diesel Tug "GERALD A. FAGAN", and the Barge "JOHN E. ENRIGHT".

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

GERALD A. FAGAN, being duly sworn, deposes and says:

That he is treasurer of the MARINE TRANSIT CORPORATION, the respondent and claimant herein. 543

The award of the arbitrators herein is signed by A. C. Field, James J. O'Donohoe, Claude N. Hitchcock and James H. Bowne. The committee who conducted the hearing was composed of five members. The fifth did not sign the award.

A. C. Field is the President of A. C. Field & Company, who are engaged in the business of grain dealers and shippers. James J. O'Donohoe is an officer of Grain Growers Export Company, being, as deponent is informed and believes, the Vice-President of

544 *Affidavit of Gerald A. Fagan.*

that company, which is likewise a grain dealer and shipper. Claude N. Hitchcock is an executive associated with Barnes-Ames Company, large grain dealers and shippers. James H. Bowne is associated with the Kusch Grain Company; Otto Kusch, the President of the Kusch Grain Company is an officer of the Canada Atlantic Grain Export Company, being, as deponent is informed and believes, the Vice-President. Both the Kusch Grain Company and Canada Atlantic Grain Export Company are grain dealers and shippers and the Canada At-
545 lantic Grain Export Company, your deponent has by investigation discovered and is informed and believes, has been frequently represented in litigations before the Court by the proctors for the libellant herein and the brokerage firm of Otto & Company, your deponent has ascertained by investigation, are the insurance brokers in connection with the placing of cargo insurance for the said Canada Atlantic Grain Export Company.

Walter Trappe, the fifth member of the committee who did not sign the award is, your deponent is informed and believes, associated as manager with the Norris Grain Company, grain dealers and ship-
546 pers.

This committee, your deponent has ascertained by investigation is named by the President of the Produce Exchange to sit for a specific period of time, which, your deponent is informed and believes, is one year. The above five men comprised the membership of the Grain Committee as constituted at the time of the hearing of the arbitration herein. No one of them is associated in business with any of the canal carriers, or represents any of the canal carriers.

Henry E. Otto, the proctor for the libellant herein, your deponent has ascertained by investigation, is President of the insurance brokerage firm of Otto & Company, having offices at No. 2 Produce Exchange. Your deponent has ascertained by investigation, and is informed and believes that the firm of Otto & Company acts as insurance brokers for practically all the companies associated with the Produce Exchange or members of the Produce Exchange which have occasion to ship cargoes from lake ports via the New York State Barge Canal, and as insurance brokers has represented or does at 548
the present time represent all of the companies which the above mentioned members of the Grain Committee are associated with.

GERALD A. FAGAN.

Sworn to before me this
20th day of January, 1930.

SHIRLEY GEIER,
N. Y. County No. 723.

549

550 **Replying Affidavit of Henry E. Otto, Read in Support of Motion to Confirm Award.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

551

against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, and the Barge JOHN E. ENRIGHT.

HENRY E. OTTO, being duly sworn, deposes and says:

I am a member of the firm of Otto & Lyon, proctors for libellant Louis Dreyfus & Company and am familiar with the proceedings heretofore had in this case and have personally appeared before the

552 Grain Committee of the New York Produce Exchange on the arbitration heretofore ordered by this court.

I have read the affidavits of Richard F. Lenahan and Gerald A. Fagan in opposition to libellant's motion to confirm the award of the said arbitration committee.

I deny that the libel proceeds on the theory of tort. The caption in the libel and complaint itself reads:

"In a cause of contract."

Furthermore, the resettlement order dated September 6, 1929, reads in part as follows:

> "Ordered that the said motion be and the same hereby is granted only as to the issues raised by the contract between the libellant and Marine Transit Corporation."

Articles 7, 8 and the first paragraph of Article 9 of the libel itself shows that libellant proceeded on the theory of a bailment and alleged a delivery of grain to the respondent carrier in good order and condition and failure on the part of the carrier to 554
redeliver the cargo to the libellant at New York in like good order and condition as when received. It incidentally sets forth details showing how the grain was damaged.

I specifically deny this shipment was made pursuant to a bill of lading. The contract of August 17, 1928, a copy of which is attached hereto and marked Exhibit 1, incorporating the terms and conditions of the New York Produce Exchange Canal Grain Charter Party No. 1 as amended March 22, 1928 was set forth as an exhibit in the motion papers to refer the controversies between the parties hereto to arbitration.

555

I attach to this affidavit a copy of the New York Produce Exchange Canal Grain Charter Party No. 1 as amended March, 1928.

It will be noted from a reading of the charter party attached hereto that bills of lading must be issued to conform with the said charter party in every respect and furthermore there is no provision in the said charter party with respect to the Harter Act. Although the carrier sets forth the Harter Act as a defense in its answer to the libel it made no reference or claim before the arbitration committee

556 *Replying Affidavit of Henry E. Otto.*

that it was relieved from liability as a result of the said Harter Act. It is my opinion that the Harter Act does not of itself apply to private carriers. In any event, even if it did apply, the carrier waived the provision of the Harter Act in its favor by agreeing to be responsible for its negligence. The charter party in question is one that applies not alone as between the parties in this case but represents a form which originally was prepared by committees representing both the Canal Carriers Association as well as the Produce Exchange and since 1924 the same has been amended on three different
557 occasions prior to the loss in question.

As will appear from the affidavits of Herbert L. Bodman, Wilfred F. Rosar and Fernend Laval, annexed hereto, the amendment to the charter party of March 22, 1928, changing the arbitration committee before whom disputes arising under this contract would be heard and determined, was done at the special instance and request of the committee representing the Canal Carriers Association of which the respondent Marine Transit Corporation was a member. It seems strange, therefore, that respondent should object at this late date to an arbitration before the said committee when it, through
558 its representatives, specifically desired the said committee in preference to another committee which was composed of both shipping and grain interests.

The arbitration before the grain committee was conducted in a perfectly proper manner and the respondent Marine Transit Corporation was allowed to offer in evidence whatever proofs or evidence or testimony it desired to. This arbitration committee did not refuse to receive any testimony which was offered by the said respondent.

In my opinion the carrier failed to prove that the tug was seaworthy. Mr. Fagan, who was vice-president and treasurer of the respondent carrier, to the best of my recollection, admitted on cross examination that he did not know the previous experience or employment of the mate of the tug and stated that some other person in his company employed the mate. The mate was the man at the wheel at the time of the disaster. He was not called as a witness although he was present in the arbitration room on both days that the case was heard. The failure to call a necessary and available witness raises the presumption that the testimony which he would give would be adverse to the carrier. The failure to call the mate also prevented a cross examination on the fitness of the mate and precluded rebuttal testimony which libellant was prepared to offer tending to show the unfitness of the mate and knowledge of the respondent of such unfitness.

I deny the statement made on the bottom of page 3 and the top of page 4 of the affidavit of Mr. Lenahan, stating that the testimony of the libellant's own witnesses offered at the hearing of the grain committee was all to the effect that the damage to the libellants' cargo was caused and occasioned by a collision or contact without any fault on the part of the tug or of anyone for whom the carrier was responsible contributing in any way thereto.

In addition to the failure of the carrier to call the man at the wheel and a necessary and available witness, the libellant called one of the captains of the head barge who was an eye witness to the disaster also a lock tender who was an employee of the United States Government and also an eye witnes Their testimony indicated that the tow approached the lock at an angle which was not the customary

manner of approaching the lock; that the head barge struck the approach wall and was dragged for a distance of from 30 ft. to 50 ft. before she hit the sluice way and subsequently sank.

The libellant also called two expert witnesses who were tugboat captains and the effect of whose testimony was that the tug was negligent. The only witness called by the respondent with respect to the cause of the disaster was the captain of the tug who, to the best of my recollection, admitted on cross examination that he was off watch at the time and did not know the condition of the current at the
563 time and place of disaster and did not know whether the steering apparatus on the barge was set up and further admitted that there were no unusual conditions of navigation and that the disaster occurred in broad daylight. No deck hands or engineers or man at the wheel was called to explain how the disaster occurred. The libellant called Major Myton in charge of the U. S. Engineers, War Department, Albany, N. Y. the effect of whose testimony was that over 100,000 boats had passed through this lock without sinking prior to this disaster; that subsequent to the disaster no recommendations were made by him to the War Depart-
564 ment with respect to any changes and that the water on the day and at the time and place in question was below normal and that there was practically no current. This testimony stands unrebutted. In my opinion, therefore, the libellant made out a very strong case against this respondent.

The United States Circuit Court of Appeals for this Circuit has held that the striking of a stationary object is not a collision in a maritime sense.

The carrier in attempting to set aside the award fails to state any specific charge of any irregularity

or corruption, but seeks to surround this arbitration committee with an atmosphere of partiality which does not exist. This is very unfair insofar as the members of the arbitration committee are concerned because they are representative men appointed by the President of the exchange. They have given their careful consideration to this case, taking eight days to make their decision. This refutes any contention of partiality.

The unfairness is accentuated when it has known that the representatives of this carrier requested that arbitration be had before this very committee. 566
After the result is adverse it now seeks to set aside the award.

In 1919 two brothers, myself and several others organized the insurance brokerage concern, Otto & Company, Inc. Since the early part of 1925, the active handling of the business of this company was entrusted to Mr. Richard H. Schweizer, secretary and director of the company. During the past five years, I have been actively engaged in the practice of the law, first being associated as a member of the firm of Carmody, McLaughlin, Easterday and Otto and now being a member of the firm of Otto & Lyon, as previously set forth. It is true
567
that Otto & Company, Inc. have handled insurance for a number of grain merchants who were members of the Produce Exchange, but this fact was well known to Mr. Gerald A. Fagan, vice-president and treasurer of the Marine Transit Corporation and was also known to Mr. Lenahan proctor for the said company. Although Mr. Fagan was present in the arbitration room with Mr. Lenahan at the time this case was heard by the arbitration committee, no exception to the fact that Otto & Company, Inc. had handled insurance for grain merchants was made to said committee.

568 *Replying Affidavit of Henry E. Otto.*

I deny, however, the statement made in the latter part of the second paragraph on page 5 of Mr. Lenahan's affidavit that Otto & Company, Inc. was the broker "for the various companies or firms which the members of the Grain Committee are associated with". As appears from the annexed affidavit of Mr. Leval, the Marine Transit Corporation has done business with some of the companies represented by the Grain Committee. None of the members of the Grain Committee are interested in libellants' or deponent's business and are not interested financially in this award. Neither is your libellant or
569 your deponent financially interested directly or indirectly in companies or firm or individuals representing said committee.

HENRY E. OTTO.

Sworn to before me this
21st day of January, 1930.

J. R. CARROLL,
Notary Public.

570

Copy of Contract of New York Produce Exchange, Annexed to Affidavit of Henry E. Otto. 571

NEW YORK PRODUCT EXCHANGE

CANAL GRAIN CHARTER PARTY No. 1

(Adopted by the members of the Grain Trade of the New York Produce Exchange at a meeting held May 12, 1924, and approved by the Board of Managers of the New York Produce Exchange May 23, 1924) 572

AMENDED AUGUST 6, 1925, APRIL 1, 1926, MARCH 22, 1928.

IT IS THIS DAY MUTUALLY AGREED

Between .....
(Owners or Agents)

and .....
(Charterers)

573

That the said Owners or Agents will furnish insurable Canal tonnage for grain as below

QUANTITY

.....bushels of.....

PORT OF LOADING

.....

.....

574 *Copy of Contract of New York Produce Exchange.*

DATE OF
LOADING

.....Loading between.....and.....

.....

Unless otherwise agreed boats must be tendered at loading port properly passed by the surveyors for underwriters as being ready to load between the hours of 9 A. M. and 5 P. M., but if boat or boats tendered are seaworthy and are properly passed on arrival of said surveyor, then if boat or boats have
575 tendered within contract period, no penalty is collectible by charterer.

DESTINATION

.....

RATE

.....cents per bushel of.....pounds, delivered weight, exclusive of elevation at ports of loading, but including trimming, transportation to destination, and delivery at any point accessible by water within the free lighterage limits of New
576 York Harbor, except deliveries to Newtown Creek and Gowanus Canal, which shall be subject to additional towing charges to cover cost of movement between mouth of Newtown Creek and destination and Court Street and destination.

INSURANCE

Unless specifically excluded at time of chartering Freight Rate includes Marine Insurance on cargo, freight and import duty, if any, which is to be covered by Charterer and premium to be deducted

from the freight. Amounts insured to be reported to the Underwriters separately as follows:

1—Value of merchandise (including elevation and costs, if any) figured at market value of merchandise at loading port at time of loading plus 5½. In case of disagreement value to be fixed by the Grain Committee of the New York Produce Exchange, which will be final.

Any additional value desired may be placed by charterers at their expense. 578

2—Duty, if any.

3—Freight.

Insurance covering Carriers Legal Liability must be placed by Carriers at their own expense, proper binder to be furnished Charterers if requested.

GENERAL AVERAGE

General Average and/or salvage charges to be adjusted according to the rules and customs of the Port of New York. 579

BONDS

Canal Companies to clear all United States Government T&E Bonds.

Owners of the grain must notify carriers in writing when ordering bonded grain for elevator. In absence of such notice from the owners of the grain,

the owners will assume any penalties imposed upon the carriers by the Government.

WHARFAGE CHARGES

Canal Companies to pay customary wharfage charges, if any, in New York Harbor.

If charterer orders grain to steamer before permitted by said steamer he shall be liable for any wharfage charges incurred at ship's side until beginning of time permitted by steamer.

581

DEMURRAGE

A. The Charterer (or his agent or assigns) is to be entitled to three (3) days, exclusive of Sundays and legal holidays (Saturday afternoon not to be construed as a holiday) to unload. Official written notice of arrival at 53rd Street, North River, or other canal terminal south thereof (unless advance orders have been placed) must be delivered to Charterer (or his agent or assigns), free time to commence from the first 12 o'clock noon, New York City time, following delivery of such notice. At the expiration of free time period, the demurrage rate
582 shall be four (4) cents per ton of 2000 lbs. per day on actual amount of grain loaded into boats.

B. Boats shall have the option to discharge on arrival (if orders have not been filed) into a public elevator at their own expense, and give free lighterage outward to final delivery. Written notice of such intention to discharge shall be given Charterer twenty-four (24) hours prior to ordering to such elevator. Storage at the rate of 1/20c. per bushel per day is to be paid by Charterers after three (3) days' free time has elapsed. Insurance

is to be covered by owners of the grain. Charterer (or his agent or assigns) is to be entitled to as many delivery orders as there were boats delivered to elevator for his account, insurance risk for any lighterage delivery from elevator to be assumed by owners of grain, no order to be for less than 8,000 bushels, unless extra expense due to small quantity is paid by Charterer, and no credit to be given for any unused portion of this privilege.

Carrier shall have further option of transferring cargoes to other insurable barges (boat for boat) instead of to a public elevator under conditions of 584
paragraph next above, except that demurrage rates applying to original barges, shall apply in place of designated elevator storage rate. This shall not be construed as final delivery.

C. If cargo is stored in elevator in accordance with Paragraph B above, Charterer (or his agent or assigns) shall have the option of accepting final delivery in elevator at any time prior to ordering out of same, in which case elevation and storage from date of elevation must be assumed by him.

DETENTION

A fleet shall consist of boat or boats, as desig- 585
nated by carrier at time of booking, and adequate motive power to tow the boat or boats to destination with continuous movement and under ordinary circumstances. A fleet shall sail within 24 hours of completion of loading and proceed to destination without delay, except that due to accidents, Acts of God, strikes, lockouts, fires, or rendering necessary aid to other vessels in distress or danger. Owners shall pay charterers demurrage at rate of 4c per ton of 2000 lbs. per day, or fraction thereof, for any

detention at loading port beginning 24 hours after completion of loading and until beginning of voyage; also for any unnecessary (avoidable by ordinary care) delay enroute, but no demurrage is chargeable for any detention at loading port between loading dates specified in charter party if operator notifies charterer before loading that boats will not move until last date. This paragraph is not applicable to any unit less than a fleet defined above, as regards delay at port of loading but does apply otherwise.

587 OUTTURN:

Official weight certificates covering quantity loaded shall be conclusive as between shippers and assigns and carriers as to quantity of cargo received inward and to be delivered on final delivery.

The boat owner and/or operator and/or carrier shall be responsible for all damage caused by their negligence or fault but shall not be liable for losses caused by dangers of navigation, fire or collision, except where caused by their negligence or fault. Neither shall they be liable for acts of God, quarantine or the public enemy. The carrier shall be

588 paid in full by consignee for any excess cargo delivered at destination, and any shortage in delivery in excess of 1/8 of 1% of intake weight shall be paid for by the carrier, at the market price of a like kind and grade of grain at New York on the day when shipment is delivered, and final quantity determined; these adjustments to be made in cash at time of payment of freight.

In case the grain becomes heated while in transit (such heating not being caused by leakage of boat, or heat from boiler or machinery) the Carrier shall

deliver his entire cargo and collect his entire freight charges on bill of lading weights.

SEPARATE CHARGERS:

Each boatload (or parcel, if less than a boatload) is to be deemed a separate charter.

CANCELLATION CLAUSE:

If grain is not ready for boats when tendered within contract period, charterers will have an extension of five days at a penalty of ½¢ per bushel. If grain is not ready within this additional period, 590 boat owners have the option of cancelling charter or rechartering; loss in freight, if any, of rechartering to be paid by charterer.

If carrier fails to tender boat or boats in contract period, an extension of five days will be allowed at penalty of ½¢ per bushel. If boats are not tendered within this additional period, charterers have the option of cancelling charter or rechartering; the extra expense, if any, of rechartering to be paid by boats.

After November 5th, of each year, the options referred to in the two preceding paragraphs may be exercised at end of contract period. In such 591 event, should the boats be unable to secure other cargo before official closing date, charterers shall be liable to them for the full amount of freight called for in the charter party. Similarly should charterers be unable to recharter before official closing date or if able to re-charter but unable to secure insurance equal to charterers customary policy, boats shall be liable for the extra cost of delivery to destination via railroad.

592 *Copy of Contract of New York Produce Exchange.*

PAYMENT OF FREIGHT:

80% of the total freight is due and payable on arrival of boats at Destination, the balance, together with demurrage and towing and/or other proper charges is due and payable after delivery has been made and actual outturn weights ascertained, subject to deduction of shortage allowances, or other substantiated claims under this particular charter.

If shortage amounts to more than 20%, carrier shall refund to the cargo owner any freight paid on
593 any shortage in excess of said 20%.

Freight is guaranteed and payable vessel or cargo lost or not lost.

In the event of loss or damage which requires return of cargo to the point of shipment or the discharge of cargo at any intermediate point or place on the voyage the full freight thereon shall be deemed to have been earned and shall be paid accordingly, but no additional freight shall be paid on grain forwarded from point of loss or damage to destination on same voyage and in the original vessel.

TOWING:

594

The Charterer to be entitled to one free-delivery on each boat within the lighterage limits of New York Harbor, and to one elevator loading on a boat at loading port. The charterer shall pay for any additional tows beyond this amount at prevailing rates. This applies to canal boats arriving afloat and does not affect deliveries to elevator under demurrage Clause B.

BILLS OF LADING:

Bills of lading must be issued to conform with this charter party in every respect. No additions or

alterations are valid without the written consent of charterers. It is distinctly understood and must be so stated on the Canal bill of lading and the said Canal bill of lading, when properly endorsed, carries full title to the property and that the insurer thereof warrants that a similar quantity and grade of grain has been cancelled from an original lake bill of lading and/or elevator receipt which likewise carried full title.

If grain is billed on original lake documents through from Western lake ports to New York, the issuance of Canal bills of lading will not be required. 596

Original lake or canal bill of lading carrying title to the grain properly endorsed must be surrendered with orders for final delivery, and cancelled by carrier or its agent.

DISPUTES

All disputes arising under this contract to be arbitrated before the Committee on Grain of the New York Produce Exchange whose decision shall be final and binding.

.....
(Owner or Agent) 597

.....
(Charterer)

Date.....19

598 **Replying Affidavit of A. C. Field, Read in Support of Motion to Confirm Award.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

599 against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, and the Barge JOHN E. ENRIGHT.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

A. C. FIELD, being duly sworn, deposes and says:

I am president of Albert C. Field, Inc. grain merchants.

I am chairman of the Committee on Grain of the
600 New York Produce Exchange, a standing committee of the Exchange, appointed by the president of the Exchange. I was chairman of the said Grain Committee for the past three years.

That on December 11th and December 12th, 1929, the Grain Committee heard the controversy between Louis Dreyfus & Company and the Marine Transit Corporation.

This Committee heard all the testimony which the Marine Transit Corpoartion desired to offer, and did not prevent the said carrier from submitting any evidence.

That this Committee after considerable discussion and deliberation decided on December 20th, 1929 to grant the award to Louis Dreyfus & Company.

That deponent and the members of his Committee were conscientious in the performance of their duties. That the Committee including deponent were sworn to faithfully perform their duty.

That this Committee was not influenced by the fact that Louis Dreyfus & Company was a grain merchant.

That Albert C. Field Inc. have not done business with Otto & Co. Inc. since 1924, and have never done business with Mr. Otto's law firm. 602

That we have, however, done business with the Marine Transit Corporation.

A. C. FIELD.

Sworn to before me this
21st day of January, 1930.

J. R. CARROLL,
Notary Public.

603

604 **Replying Affidavit of Fernand Leval, Read in Support of Motion to Confirm Award.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

605

against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, and the Barge JOHN E. ENRIGHT.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

FERNAND LEVAL, being duly sworn, deposes and says:

606 I am in charge of the New York office of the libellant, Louis Dreyfus & Company. I was a member of the Canal Grain Charter Party Committee of the New York Produce Exchange on and before March, 1928. That I have read the affidavit of Mr. Herbert L. Bodman, Chairman of the said Committee in March, 1928 and do hereby confirm that the same is true in every respect.

It was a Canal Carrier's Committee which met with our committee who requested that the Grain Committee hear and determine disputes in the future instead of the Arbitration Committee of the

Exchange, which had acted for about four years prior thereto.

I deny that libellant's cargo of grain was shipped on the barge Edward A. Ryan pursuant to a bill of lading.

The contract between libellant and respondent, Marine Transit Corporation, was in writing, dated August 17, 1928 and incorporated the terms and conditions of the New York Produce Exchange Canal Grain Charter Party as amended March 22, 1928.

It will be noted that the said charter party specifically provides that bills of lading must be issued 608
to conform with the charter party in every respect and that no alterations or changes may be made except with the written consent of charterer. Bill of Lading was issued by the carrier after the grain had been delivered to it and was not issued to us. Upon information and belief, Mr. Fagan, vice-president and treasurer of the Marine Transit Corporation, knew prior to contracting with us for the transportation of this shipment, that the Arbitration Committee provided for by the contract was composed of grain merchants. He also knew that Otto & Company, Inc., placed insurance for various grain merchants of the Produce Exchange. 609

Upon information and belief Marine Transit Corporation did business with the various grain merchants of the New York Produce Exchange and including some of the firms with which the members of the Grain Committee are associated.

Libellant is not interested in the various companies or firm with which the members of the Grain Committee are associated, and vice versa.

The respondent's attorney brought to the attention of the Grain Committee from the start that

610 *Replying Affidavit of Fernand Leval.*

both libellant and respondent were insured, so that there could be no possibility of partiality shown to libellant because of its being a grain merchant.

FERNAND LEVAL.

Sworn to before me this
21st day of January, 1930.

A. R. CRAWFORD,
Notary Public.

611

612

Replying Affidavit of Herbert L. Bodman, Read in Support of Motion to Confirm Award. 613

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, and the Barge JOHN E. ENRIGHT. 614

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

HERBERT L. BODMAN, being duly sworn, deposes and says:

I reside at Glenhead, Nassau County, Long Island. I am President of Milmine Bodman & Co., Inc., grain merchants at No. 2 Broadway, New York City and also am a director in the Seaman's Bank for Savings in New York and trustee of the New York Produce Exchange. 615

On and before March 22nd, 1928 I was Chairman of the Canal Grain Charter Party Committee of the New York Produce Exchange, a special committee appointed by the President of the Exchange to negotiate with a committee of the canal carriers association with respect to canal charter party.

616 Associated with me on the said committee at that time was Mr. Wilfrid F. Rosar and Mr. Fernand Leval. The canal charter party which was adopted in 1924 by the New York Produce Exchange after meeting between a committee of the Produce Exchange and a commitee of the Canal Carriers Association, provided for arbitration before the Arbitration Committee of the New York Produce Exchange. The committee representing the Canal Carriers Association objected to having arbitrations heard and determined by this committee.

617 Our committee did not favor any change of the committee which was to hear and settle disputes under this charter party. It appeared that prior to the conference which the carrier's committee had with our committee that one or more of the canal carriers had arbitrated before this Arbitration Committee and had lost. The canal carriers committee complained that the committee in question was not composed of merchants or forwarders who were active in the business on the canal and that as the questions involved were extremely technical they were not a proper body to act in disputes between the carriers and shippers.

618 I personally took a strong position in this matter and insisted that arbitration be had before this regular committee rather than any other body. Finally, however, in deference to the wishes of the canal carriers and at their special instance and request, we agreed to eliminate the arbitration committee and arbitration was arranged to be had before the grain committee. The members of the Grain Committee were at that time and have been prior and subsequent thereto, members of the grain trade, that is, wen who are representing grain merchants. The grain committee is the standing committee of

the New York Produce Exchange appointed by the president and is frequently used by merchants among themselves to settle technical difficulties where an intimate knowledge of the grain trade is required. The arbitration committee of the New York Produce Exchange to which the canal carriers objected was composed of five men and for the fiscal year ending June, 1928, was composed of two retired grain merchants, one of whom was then President of the North American Grain Association and the other President of a New Jersey bank; two active members of the steamship trade, one of whom 620
at one time was President of the U. S. S. B. E. F. Corp. and Chairman of the Executive Committee of the Chamber of Commerce of the State of New York, and another an active member of the flour trade. All of the five members of the aforesaid committee, with one exception, have been President of the New York Produce Exchange.

HERBERT L. BODMAN.

Sworn to before me this
21st day of January, 1930.

J. R. CARROLL, 621
Notary Public.

622 **Replying Affidavit of Wilfred F. Rosar, Read in Support of Motion to Confirm Award.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

623 against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, and the Barge JOHN E. ENRIGHT.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

WILFRED F. ROSAR, being duly sworn, deposes and says:

I reside at 50 Moore Road, Bronxville, New York.

624 I am a member of the firm of John Melady & Company, members of the New York Stock Exchange and other leading exchanges in this country and was on and before March, 1928, a member of the Canal Grain Charter Party Committee of the New York Produce Exchange.

I have read the affidavit of Herbert L. Bodman, Chairman of the Canal Grain Charter Party Committee and do hereby affirm that the same is true in every respect.

The Committee representing the canal carriers met with the committee representing the New York

Produce Exchange and together amended the charter party then existing. It was at the special instance and request of the Carriers' Committee that our committee agreed to and did change the arbitration committee from the regular arbitration committee of the Exchange to the Grain Committee of the Exchange.

WILFRED E. ROSAR.

Sworn to before me this
21st day of January, 1930.

626

(Signature illegible)
Notary Public, Bronx Co. No. 17
N. Y. Co. Clk. No. 1397
Commission expires March 30, 1931

627

628 **Replying Affidavit of Moses Cohen, Read in Support of Motion to Confirm Award.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

629

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, and the Barge JOHN E. ENRIGHT.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

MOSES COHEN, being duly sworn, deposes and says: I reside at 607 West End Avenue, New York City. I am president of the Canada Atlantic Grain Export Co., Inc.

630 That Mr. Bowne, a member of the Grain Committee, is not in any way connected with Canada Atlantic Grain Export Co., Inc. I further state that Mr. Keusch has not been active in the business of the Canada Atlantic Grain Export Co., Inc., for the past three years due to illness and that he has been away from the office for three or four months at a time during the summer period.

MOSES COHEN.

Sworn to before me this
21st day of January, 1930.

J. R. CARROLL,
Notary Public.

Memorandum of Caffey, J., January 24, 1930. 631

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, and the Barge JOHN E. ENRIGHT.

100/231. 632

I understand that the taking of testimony by the arbitrators was completed December 12, 1929; that the stenographer who took the minutes was selected and is employed either by one of the arbitrators or by a firm of which one of the arbitrators is a member or by an exchange to which all the arbitrators belong; that on December 27, 1929, respondent applied for a copy of the minutes; that the request has 633 not been complied with.

From examining the papers already submitted, my tentative impression is that the case can properly be disposed of without resort to the minutes. Nevertheless, in their affidavits both parties attempt to summarize parts of the testimony before the arbitrators, which I could more satisfactorily consider if I had the minutes, and respondent insists that the motion to confirm the award cannot be justly decided unless I see all the testimony.

634 *Memorandum of Caffey, J.*

The delay in furnishing transcript of the testimony is little less than intolerable. Despite my feeling that the minutes probably will not be needed, the desire of one of the parties to have me examine them seems to me sufficient reason for the court to exert its power, if any, to compel their production.

The arbitration is under the supervision of the court. Unless copy of the minutes be delivered at my chambers by next Wednesday (January 29), I shall make an order on that subject or on the mo-
635 tion. In event the minutes are not received by me at the time specified, I wish both libellant and respondent by noon of the next day to leave at my chambers affidavits (of which each shall serve a copy on the other) showing, with dates and in detail, the efforts made, both preceding and since the making of the present motion, to procure the minutes. I shall also be glad, particularly if the proof discloses supervision or control of the stenographer by any arbitrator, to have memoranda as to the power of the court under the arbitration statute (1) to regard continued failure of the stenographer to furnish copy of the minutes as misconduct by an
636 arbitrator or by the arbitrators and (2) to withhold action on the motion to confirm the award until the minutes are forthcoming or to deny the motion if they be not forthcoming.

Dated, January 24, 1930.

FRANCIS G. CAFFEY,
U. S. D. J.

Memorandum Confirming Award. 637

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, its motors, equipment, etc., and the Barge JOHN E. ENRIGHT, its tackle, apparel, gear, etc.,

Respondent.

100/231. 638

I think the objections by respondent are not substantial or are not sustained by the record.

The issues heard and decided by the arbitrators were within the terms of the order referring the matter to them, as well as within the terms of the agreement to arbitrate. I discover nothing irregular in the proceedings. 639

Motion to confirm award granted.
Dated, February 1, 1930.

FRANCIS G. CAFFEY,
U. S. D. J.

640 **Order Granting Motion to Confirm Award.**

At a Stated Term of the United States District Court held in and for the Southern District of New York at the Court House in the Borough of Manhattan, on the 7th day of February, 1930.

Present—Honorable FRANCIS G. CAFFEY, *U.S.D.J.*

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and
641 style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, and the Barge JOHN E. ENRIGHT.

A motion by Libellant having duly come on to be heard before me on the 17th day of January, 1930 for an order confirming the award of the Committee on Grain of the New York Produce Exchange under date of December 20th, 1929.

642 Now upon reading and filing the notice of motion dated December 23, 1929, the affidavit of Henry E. Otto, sworn to on the 23rd day of December, 1929, and exhibits all attached to the notice of motion, the affidavits of Henry E. Otto, A. C. Field, Fernand Leval, Herbert L. Bodman, Wilfred F. Rosar and Moses Cohen, each sworn to on the 21st day of January, 1930, in support of said motion and the affidavits of Richard F. Lenahan and Gerald A. Fagan, each sworn to on the 20th day of January,

1930, in opposition thereto and also the typewritten minutes of the hearings before the said Committee, and after hearing Henry E. Otto of counsel for libellant, in support of said motion, and Richard F. Lenahan of counsel for the Marine Transit Corporation, respondent herein and the claimant of the tug GERALD A. FAGAN, in opposition thereto, and due deliberation having been had, and the Court having filed its opinion in writing, it is, upon motion of Otto & Lyon, proctors for libellant,

ORDERED that the Award of the Committee on Grain of the New York Produce Exchange under 644
date of December 20, 1929, be and the same is, in all respect confirmed, and it is further

ORDERED that Louis Dreyfus & Company, libellant, recover of and from Marine Transit Corporation, the respondent herein, the sum of $23,016.00, plus interest to the date of the award, amounting to $1,668.66, with interest on both amounts, from the date of the award, viz: December 20th, 1929, the costs and expenses of the arbitration amounting to $362.50 to be paid by the Marine Transit Corporation, and it is

645

FURTHER ORDERED that unless the Marine Transit Corporation, respondent, cause payment to be made within ten days after service of a copy of this order, with notice of entry on proctors for respondent, execution issue against Marine Transit Corporation, respondent, and Continental Casualty Company, stipulator for cost and value, their goods, chattels and lands, to satisfy this decree.

FRANCIS G. CAFFEY,
U. S. D. J.

646 **Order to Show Cause, Read in Support of Motion Restraining Libellant from Recovering from the Claimant or Its Stipulators on Behalf of the Tug "Gerald A. Fagan".**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

647 Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel Tug "GERALD A. FAGAN" and the Barge "JOHN E. ENRIGHT",

Respondent.

Upon the annexed affidavit of Richard F. Lenahan, sworn to the 11th day of February, 1930, and

648 upon the pleadings and proceedings had herein, let the libellant, or its proctors, show cause before this Court at the hearing of admiralty motions, to be held on the 14th day of February, 1930, at 10:30 A. M., or as soon as counsel can be heard, at Room 2, 12th Floor, Woolworth Building, in the Borough of Manhattan, City of New York, why an order should not be made restraining the libellant from recovering from the claimant or its stipulators on behalf of the tug "Gerald A. Fagan", and why the claimant should not have such other and further relief as to this Court may seem just and proper in

649

the premises. In the meantime, and until the hearing and final determination of this motion and the entry of an order thereon, let all proceedings on behalf of the libellant, its attorneys, and the United States Marshal be stayed.

Reasons appearing therefor let service of a copy of this order, together with the annexed affidavit on the proctors for the libellant this day before six P. M. deem sufficient.

Dated, February 11, 1930.

650

HENRY W. GODDARD,
U. S. D. J.

651

652 **Affidavit of Richard F. Lenahan, Read in Support of Motion Restraining Libellant from Recovering.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS DREYFUS, *et al.*,
Libellant,

against

MARINE TRANSIT CORPORATION,
653 Respondent.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

RICHARD F. LENAHAN, being duly sworn, deposes and says: That he is Proctor for the Marine Transit Corporation, respondent herein, and as claimant of the tug "Gerald A. Fagan"; that he has charge of this cause since its inception.

Libel and complaint of Louis Dreyfus and Charles Louis Dreyfus, copartners, doing business
654 under the firm name and style of Louis Dreyfus & Co. against Marine Transit Corporation, the diesel tug "Gerald A. Fagan" and the barge "John E. Enright", was filed in the office of the Clerk of the within named Court on December 14, 1928, Court Docket No. 100-231. Your deponent's office was then retained upon behalf of the Marine Transit Corporation as respondent and as claimant of the tug "Gerald A. Fagan". Answer was filed upon its behalf as respondent and as claimant some time subsequent. A motion was brought on before this Court by the office of Otto & Lyon, proctors for the

libellant, for an order referring this dispute, which arose under the contract between the libellant and the respondent, Marine Transit Corporation, to the Committee on Grain of the New York Produce Exchange, to be arbitrated said motion having been sustained, and where as the controversy existing between Louis Dreyfus and Marine Transit Corporation was, by an order of the United States District Court, in and for the Southern District of New York, dated the 6th day of September, 1929, submitted by them to the Committee on Grain of the New York Produce Exchange as arbitrators for their adjudication and award. 656

The arbitrators having consented to act as such, and having duly met together and deliberately heard the allegations and proofs of the said parties, do arbitrate, adjudge and award of and concerning the said controversy as follows:

The Marine Transit Corporation shall pay to Louis Dreyfus & Co.—$23,016, the loss caused through the sinking of the barge "Edward A. Ryan", plus interest amounting to $1,668.66. Thereupon, the libellant having duly moved for an order confirming the award of the Committee on Grain of the New York Produce Exchange and after due deliberation the said award of the Committee having been confirmed in all respects, whereupon the proctors for the libellant prepared a final decree and order, granting motion to confirm the award, decreeing for a recovery by the libellant of and from the Marine Transit Corporation in accordance with the award. However, in their prayer for relief, they pray for alternative relief as follows: That unless the Marine Transit Corporation, respondent, cause payment to be made within ten days after service of a copy of this order with no- 657

658 *Affidavit of Richard F. Lenahan.*

tice of entry on the proctors for the respondent, execution issue against Marine Transit Corporation, respondent, and Continental Casualty Company, stipulator for costs and value, their goods, chattels and lands to satisfy this decree. The prayer for relief is entirely inconsistent with the findings of the Committee on Grain and the procedure had herein.

Your deponent prays for an order restraining the libellant from recovering from the claimant or its stipulators on the tug "Gerald A. Fagan".

659 No previous application for this order has been made.

R. F. LENAHAN.

Sworn to before me this 11th day of February, 1930.

JOHN E. BROWNE.

660

Affidavit of Henry E. Otto, Read in Opposition to Motion Restraining Libellant from Recovering.

661

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

662

against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, and the Barge JOHN E. ENRIGHT,

Respondent.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

HENRY E. OTTO, being duly sworn, says: I am a member of the firm of Otto & Lyon, proctors for the libellants, Louis Dreyfus & Company, and have 663 had sole charge of this case since its inception.

On or about the 4th day of October, 1929, Mr. Lenahan, proctor for the Marine Transit Corporation, which is respondent as well as claimant of the tug Gerald A. Fagan, made application to the Arbitration Committee for an adjournment of about two months. At that time Mr. Lenahan stated that libellants would not be prejudiced by such adjournment, inasmuch as libellants had a stipulation for value.

664 *Affidavit of Henry E. Otto.*

On the 27th day of December, 1929, upon the return of the motion to confirm the award, Mr. Lamb, one of the proctors for the Marine Transit Corporation, requested an adjournment, contending that libellant would not be prejudiced by the delay inasmuch as libellants were secured by a stipulation for value. Again after four adjournments, all at the request of proctors for respondent-claimant, the motion came on to be heard on the 17th day of January. Mr. Lenahan was not present in the morning and the Court set the time for argument
665 at 2:00 P. M. of the said day. At that time Mr. Lenahan was present and again requested a delay, setting forth the fact that the libellants had a stipution for value so they would not be prejudiced.

WHEREFORE deponent respectfully requests that the motion to restrain libellants from recovering from the claimant or its stipulators, be in all respects denied.

HENRY E. OTTO.

Sworn to before me this 14th day of February, 1930.

666

WILLIAM H. CRAWFORD,
Notary Public,
Kings County.
Kings Co. Clks. No. 499, Reg. No. 1119
N. Y. Co. Clks. No. 237, Reg. No. 1C193
Queens Co. Clk. No. 1166, Reg. No. 8262
Bronx Co. Clks. No. 60, Reg. No. 3172A
Certificates filed in Westchester Co.
Certificate filed in Richmond Co.
Commission expires March 30, 1931.

Memorandum of Caffey, J., Denying Order to Show Cause. 667

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, and the Barge JOHN E. ENRIGHT

Respondent.

A 100-231

668

In consequence of the proceeding being in rem, libellant would have been entitled to have the tug arrested and held as security for the cause of action alleged in the libel. The stipulation for value stands in the place of the tug as security and is subject to the authority of the court that would be applicable to the tug if it were now in custody 669 (*United States* v. *Ames*, 99 U. S. 35, 36). By force of the arbitration statute (9 U. S. C. Sec. 8) the reference to arbitration of the dispute, covered by the pleadings, did not diminish or impair the jurisdiction of this court to make the same decree that it would have granted if, after trial, it had reached the same conclusion as the arbitrators. If a plenary trial had occurred, then, according to the usual practice in admiralty, the court might properly direct execution against the stipulator for enforce-

670 *Memorandum of Caffey, J., Denying Order to Show Cause.*

ment of the decree (*The Wanata* v. *Avery*, 95 U. S. 600, 616). This would be in conformity with local admiralty rule 8, as well as the condition of the stipulation itself. For this purpose notice to the stipulator is not required and the decree may be entered summarily (28 U. S. C., Sec. 754; *The Belgenland*, 108 U. S. 153, 156; *Johnson* v. *Chicago and Pacific Elevator Co.*, 119 U. S. 338, 401). It follows that inclusion in the decree on the award of the provision it contains with respect to execu-
671 tion against the stipulator is correct.

Motion denied.

Dated, February 27, 1930.

FRANCIS G. CAFFEY,
U. S. D. J.

672

Order Denying Motion to Restrain Libellant from Recovering from Claimant or Its Stipulators on Behalf of Tug Gerald A. Fagan. 673

At a Stated Term of the United States District Court held in and for the Southern District of New York at the Courthouse in the Borough of Manhattan, on the 7th day of March, 1930.

Present—Honorable FRANCIS G. CAFFEY, *U. S. D. J.*

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY, 674

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel Tug GERALD A. FAGAN, and the Barge JOHN E. ENRIGHT.

An order to show cause why an order should not be made restraining the libellant from recovering from the claimant or its stipulators on behalf of 675 the tug GERALD A. FAGAN, having duly come on to be heard before me on the 14th day of February, 1930.

Now, on reading and filing the order to show cause dated the 11th day of February, 1930, the affidavit of R. F. Lenahan, sworn to on the 11th day of February, 1930 in support of the order to show cause and the affidavit of Henry E. Otto, sworn to on the 14th day of February, 1930, in opposition thereto and due deliberation having

676 *Order Denying Motion to Restrain Libellant from Recovering from Claimant or Its Stipulators on Behalf of Tug Gerald A. Fagan.*

been had and the court having filed its opinion in writing, it is, upon motion of Otto & Lyon, proctors for the libellant,

ORDERED, that the motion be and the same hereby is, in all respect, denied; and it is

FURTHER ORDERED, that the libellant may recover of and from the Marine Transit Corporation, or its stipulators.

677

FRANCIS G. CAFFEY,
U. S. D. J.

678

Notice of Appeal. 679

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel Tug "GERALD A. FAGAN" and Barge "JOHN E. ENRIGHT",

Respondent.

680

A 100/231.

SIRS:

PLEASE TAKE NOTICE that Marine Transit Corporation, claimant and respondent in the above enumerated cause, hereby appeals to the United States Circuit Court of Appeals, for the Second Circuit, from the final decree entered herein on the 8th day 681

682 *Notice of Appeal.*

of February, 1930, and from each and every part of said decree.

Dated: New York, N. Y., March 3rd, 1930.

Yours, etc.,

MACKLIN, BROWN, LENAHAN & SPEER,
Proctors for Claimant & Respondent,
Office & P. O. Address:
No. 44 Beaver Street,
Borough of Manhattan,
City of New York.

683

To:
ALEXANDER GILCHRIST, JR.,
Clerk of the Court.

OTTO & LYON, Esqs.,
Proctors for Libellant,
Office & P. O. Address,
No. 60 Broad Street,
Borough of Manhattan,
City of New York.

684

Assignments of Error. 685

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, 686

Respondent,

Diesel Tug "GERALD A. FAGAN", MARINE TRANSIT CORPORATION,

Claimant,

and

Barge "JOHN E. ENRIGHT".

MARINE TRANSIT CORPORATION, respondent and claimant of the tug "GERALD A. FAGAN", hereby assigns error to the decree and proceedings of this 687 Court as follows:

1. In ordering and directing the arbitration of any of the issues in this action.

2. In holding that there were any issues raised by the pleadings in this action which were arbitrable under the grain charter party agreement entered into between libellant and respondent, Marine Transit Corporation.

688 *Assignments of Error.*

3. In failing to hold that the issues raised by the pleadings in this action were not such disputes as were contemplated under the arbitration clause of the said grain charter party agreement.

4. In failing to hold that there were no issues raised by the pleadings in this action of such a nature and character as to be severable from the other issues in the suit and separately capable of arbitration under the said grain charter party agreement.

689 5. In confirming the award of the arbitrators herein.

6. In failing to hold that the arbitrators exceeded their powers.

7. In failing to hold that the award of the arbitrators was outside the scope of the issues referred to them by the terms of the order of this Court.

8. In failing to hold that the arbitrators so imperfectly executed their powers that a mutual, final and definite award upon the subject matter sub-
690 mitted was not made.

9. In failing to find that there was no evidence of negligence on the part of the respondent adduced before the arbitrators.

10. In failing to find that there was evident partiality in the arbitrators concurring in the award.

11. In failing to vacate the award of the arbitrators.

12. In failing to modify the award of the arbitrators upon the ground that in making their award, they necessarily passed upon, determined, and awarded upon matters not submitted to them under the order of this Court.

13. In that the District Court failed to take such further proceedings as were necessary for a final determination of the issues raised by the pleadings in this action.

14. In failing to hold that Marine Transit Corporation as respondent herein was entitled to the benefits of the Harter Act. 692

15. In failing to hold that Marine Transit Corporation as claimant of the tug "Gerald A. Fagan" was entitled to the benefits of the Harter Act.

16. In failing to vacate the award of the arbitrators and to dismiss the libel herein on the ground that Marine Transit Corporation had in the testimony taken before the arbitrators established its right to the benefits of the Harter Act, both as respondent and as claimant of the tug "Gerald A. Fagan" or in failing to take such further proceedings as were necessary to give Marine Transit Corporation an opportunity to prove compliance with the provisions of the Harter Act and its right to the benefits thereof. 693

17. In that the barge "John E. Enright" not being before the arbitrators, this Court by its confirmation of the award of the arbitrators and the entry of its final decree has precluded the Marine Transit Corporation from showing that if there was any negligence in connection with the loss or dam-

694 *Assignments of Error.*

age of libellant's cargo, such negligence was primarily that of the barge "John E. Enright".

18. In directing by its final decree herein the issuance of execution against Continental Casualty Company, the stipulator for value on the bond posted herein on behalf of the tug "Gerald A. Fagan", although no issues respecting the liability of the tug "Gerald A. Fagan" in rem was submitted to the arbitrators under the order of this Court and although the award of the arbitrators did not and could not have determined any in rem liability on
695 the part of the said steamtug.

Dated: New York, N. Y., May , 1930.

MACKLIN, BROWN, LENAHAN & SPEER,
Proctors for Claimant & Respondent,
Office & P. O. Address:
No. 44 Beaver Street,
Borough of Manhattan,
City of New York.

To:

ALEXANDER GILCHRIST, Esq., Clerk,
United States District Court,
Southern District of New York.

696 Messrs. OTTO & LYON;
Proctors for Libellant,
Office & P. O. Address,
No. 60 Broad Street,
New York, N. Y.

THOMAS A. MCDONALD, Esq.,
Proctor for Barge "John E. Enright",
Office & P. O. Address,
No. 15 William Street,
Borough of Manhattan,
City of New York.

Additional Assignments of Error. 697

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellant-Appellee,

against

MARINE TRANSIT CORPORATION, 698
Respondent-Appellant,

Diesel Tug "GERALD A. FAGAN",
MARINE TRANSIT CORPORATION,
Claimant-Appellant,

and

Barge "JOHN E. ENRIGHT".

MARINE TRANSIT CORPORATION, respondent and claimant of the tug "Gerald A. Fagan" hereby assigns additional errors to the final decree and proceedings of this Court, as follows: 699

1. The Court below erred in entering the orders of August 28th, 1929 and of September 21, 1929, ordering the Marine Transit Corporation to submit to arbitration the issues raised by the contract between it and the libellant as the contract between them did not fall within the terms of the Arbitration Act of Congress enacted February 12, 1925.

700 *Additional Assignments of Error.*

2. The Court erred in entering said orders, as it lacked any jurisdiction to order said matters to be arbitrated under the provisions of the said Arbitration Act, enacted on February 12, 1925.

3. The Court erred in entering said orders as said Arbitration Act, enacted by Congress on February 12, 1925, is invalid, being in conflict with Section 1 of Article 3 and of Clause 1, Section 2 of Article 3 of the Constitution of the United States.

701

MACKLIN, BROWN, LENAHAN & SPEER,
Proctors for Marine Transit Corporation, Claimant and Respondent.

702

Order Discontinuing Action as to Barge "John E. Enright". 703

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, Diesel tug "Gerald A. Fagan", Barge "John E. Enright",

Respondents,

JOHN E. WALL, Claimant of the barge "John E. Enright".

Docket 704
100-231.

Upon the annexed consent of proctors for the respective parties hereto, and upon motion of Thomas A. McDonald, proctor for the claimant, John E. Wall, it is hereby 705

ORDERED that the above entitled action be and the same hereby is discontinued as against the canal barge "John E. Enright".

Dated, New York City, March 25th, 1930.

ALEX GILCHRIST, JR.,
Clerk.

706 *Order Discontinuing Action as to Barge "John E. Enright".*

We hereby consent to the entry of the foregoing order.

OTTO & LYON,
Proctors for Libellant.

THOMAS A. MCDONALD,
Proctor for Claimant.

707

708

Stipulation as to Exhibits. 709

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel Tug "GERALD A. FAGAN" and Barge "JOHN E. ENRIGHT", 710

Claimant.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that exhibits marked Marine A and L. Dreyfus #5, photographs, and three exhibits, L. D. A. 1 and two marked A. R. C. 12/11/29, which are blue prints, be not printed in the transcript of record on appeal but same may be handed up by either party on the argument.

Dated: New York, N. Y., August 21, 1930. 711

OTTO & LYON,
Proctors for Libellant.

MACKLIN, BROWN, LENAHAN & SPEER,
Proctors for Claimant.

So ordered.

....., U. S. D. J.

14-987
McC/EE

712 **Stipulation as to Record.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

713

MARINE TRANSIT CORPORATION, the Diesel Tug "GERALD A. FAGAN" and Barge "JOHN E. ENRIGHT",

Respondent.

It is hereby stipulated and agreed that the foregoing is a true copy of the transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, November , 1930.

714 MACKLIN, BROWN, LENAHAN & SPEER,
Attorneys for Respondents-Appellants.

OTTO & LYON,
Attorneys for Libellant-Appellee.

Clerk's Certificate.

715

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Libellants,

against

MARINE TRANSIT CORPORATION, the Diesel Tug "GERALD A. FAGAN" and Barge "JOHN E. ENRIGHT",

Respondent.

716

I, CHARLES WEISER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct copy of the transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City 717
of , in the Southern District of New York, this day of , in the year of our Lord one thousand nine hundred and thirty and of the Independence of the said United States the one hundred and fifty-fifth.

CHARLES WEISER,
Clerk.

(Seal)

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1930

No. 293

Argued March 12, 1931. Decided April 20, 1931

LOUIS DREYFUS and CHARLES LOUIS DREYFUS, Copartners, Doing Business under the Firm Name and Style of Louis Dreyfus & Company, Libelants-Appellees,

v.

MARINE TRANSIT CORPORATION, Respondent-Appellant; the Diesel Tug Gerald A. Fagan, Marine Transit Corporation, Claimant-Appellant, and the Barge John E. Enright

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, L. Hand, and Chase, Circuit Judges

OPINION

Appeal from the District Court for the Southern District of New York from a final decree in admiralty entered upon the award of arbitrators. The libel was filed by Louis Dreyfus and Charles Louis Dreyfus, copartners, against the Marine Transit Corporation and the tug Gerald A. Fagan. An order was entered directing that an arbitration proceeding provided for in the contract of transportation be had. From the decree entered on that arbitration award, the Marine Transit Corporation and the tug Gerald A. Fagan, appeal. Decree affirmed.

Macklin, Brown, Lenahan & Speer, of New York City (Horace L. Cheyney, of New York City, of counsel), for appellants.

Otto & Lyon, of New York City (George V. A. McCloskey, of New York City, of counsel), for appellees.

MANTON, Circuit Judge:

A final decree in admiralty was entered below, on an award of arbitrators, in a proceeding under section 8 of

the United States Arbitration Act (43 Stat. 884, title 9, U. S. Code § 8 [9 U. S. C. A. § 8]). The controversy arose under a contract whereby appellant agreed to furnish appellee as charterer insurable canal tonnage for about 200,000 bushels of wheat on the Buffalo to New York part of an international carriage from Ft. William, Ont., for export. This cargo was "in bond for export," covered by a bill of lading, as to 19,200 bushels, which was laden upon the barge Edward A. Ryan, for the loss of which this libel was filed and seizure of the tug made. The Ryan, with two other barges, was in tow of the appellant tug Fagan on September 25, 1928, when, on entering the government lock at Troy, N. Y., the Ryan came in contact with the guide wall and sank with its cargo. The libel is in rem against the tug Fagan and the barge Enright and in personam against the appellant, Marine Transit Corporation. The appellant appeared and filed a claim in rem and gave a stipultion for value to relese the tug. The contract included an arbitration provision requiring disputes thereunder to be arbitrated before the Committee on Grain of the New York Produce Exchange. The court ordered the appellant to submit to arbitration all issues under the contract. The arbitration proceeded, and an award was made against the appellant and later confirmed by the court below, and the decree appealed from was entered. Later a motion to restrain the recovery on this decree was denied. A discontinuance was entered against the barge Enright.

Section 8 of the Arbitration Act provides:

"That if the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award."

Appellant argues that the Arbitration Act is invalid because in conflict with section 1, art. 3, of the Constitution, providing that the judicial power of the United States shall be vested in the Supreme Court and such inferior

courts as Congress may from time to time ordain and establish, and because section 2, art. 3, of the Constitution, provides that the judicial power shall extend "to all Cases of admiralty and maritime Jurisdiction," and therefore "Congress cannot vest any judicial power in any body otherwise than a court duly created." Moreover, the argument proceeds, there can be no delegation of this judicial power of the courts either by the courts themselves or by Congress. The Supreme Court and its original jurisdiction was prescribed by the Constitution. Inferior federal courts have only statutory jurisdiction, and Congress may grant as much or little of the judicial power as it will. It has been long settled that the District Courts have only such right to jurisdiction as Congress grants, and it may withhold jurisdiction in accordance with the procedural requirements of Congressional enactment. Jackson v. Steamboat Magnolia, 20 How. 296, 15 L. Ed. 909.

The Arbitration Act is a procedural statute and within the competency of Congress. Congress has the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Article 1, § 8, clause 18. This includes the power to establish courts, power over interstate and foreign commerce (article 1, § 8, clause 3), and jurisdiction over admiralty and maritime matters (article 3, § 2, clause 1). The Arbitration Act is directed solely to a remedy. Atlantic Fruit Co. v. Red Cross Line, 5 F. (2) 218 (C. C. A. 2); Matter of Berkovitz v. Arbib & Houlberg, 230 N. Y. 261, 130 N. E. 288. The validity of a clause providing arbitration under the New York Arbitration Act (Consol. Laws, c. 72) was held no constitutional impediment in Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109, 44 S. Ct. 274, 276, 68 L. Ed. 582. In that case it was said that agreements in admiralty to submit controversies to arbitration were valid and "reference of maritime controversies to arbitration had long been common practice."

The act does not deprive the District Court of jurisdiction, but seems to enlarge that jurisdiction so as to embrace the enforcement of arbitration agreements not only by ordering such arbitration to proceed, but by entering a

decree upon the award. The Supreme Court said in Red Cross Line v. Atlantic Fruit Co., supra (at page 123 of 264 U. S., 44 S. Ct. 274, 277): "The reluctance of the admiralty court to lend full aid goes, however, merely to the remedy." And that "the substantive right created by an agreement to submit its disputes to arbitration is recognized as a perfect obligation."

The power under section 8 to enforce specific performance of the contract to arbitrate is but a remedy incident to jurisdiction under the act. Hartford Accident Co. v. Southern Pacific, 273 U. S. 207, 47 S. Ct. 357, 71 L. Ed. 612; Morse Drydock Co. v. The Northern Star, 271 U. S. 552, 46 S. Ct. 589, 70 L. Ed. 1082. The loss of cargo was a proper subject for arbitration under the contract; it was a subject-matter the parties intended to arbitrate if a loss occurred.

The suggestion that the grain committee was not qualified to pass upon the questions presented is sufficiently answered by the fact that the parties selected them to do so. The claim that the committee had no regard for the defense under the provisions of the Harter Act (46 U. S. C. A. §§ 190-195) is without merit. The New York Produce Exchange canal grain charter party No. 1 excludes the application of the Harter Act by its provisions. The criticism of the sufficiency of the libel is equally without merit. It is immaterial whether the libel against the appellant sounds in tort or in contract. Dampskibs Aktieselskabet Thor v. Tropical Fruit Co., 281 F. 740 (C. C. A. 2). That the award was not signed by all the arbitrators is not a barrier forbidding entry of the decree. There is no provision of the contract cited nor does the act of Congress require unanimity. A committee of four out of five signed the award.

But it is said the grain was not established to be for foreign shipment. It was shipped to the order of the Bank of Nova Scotia from Ft. William, Ontario, and "in bond for export," and appellant's bill of lading provided: "Deliver only on surrender of original Lake Bill of Lading properly endorsed." The lake bill of lading recognized the shipment as international. The bond is given by the carrier. Section 551 of the Act of Sept. 21, 1922, 42 Stat. 975, section 451, title 19, U. S. Code (19 U. S. C. A. § 451).

See B. & O. S. W. R. R. Co. v. Settle, 260 U. S. 166, 43 S. Ct. 28, 67 L. Ed. 189.

Since it was an international carriage, there is no doubt the Arbitration Act applies. But section 8 provides, as the basis of jurisdiction, an admiralty cause of action involving libel and seizure, and it declares such basis of jurisdiction to be independent of the provisions of the act "notwithstanding anything herein to the contrary." From an examination of this act, it will appear that the terms "maritime transactions" and "commerce" defined in section 1, are found again in section 2 (9 U. S. C. A. §§ 1, 2). Sections 4 and 8 (9 U. S. C. A. §§ 4, 8), which permit applications to the court, make no reference to these terms.

The parties claiming to be aggrieved at bar were the appellees as they applied under section 8 of the Arbitration Act because of the appellant's "failure, neglect, or refusal * * * to arbitrate under a written agreement for arbitration" (section 4), and nothing in either section 4 or 8 confines such written agreement for arbitration to agreements involving maritime transactions in the limited sense. Section 1, with reference to foreign commerce as distinguished from any other subject-matter of which a court of admiralty would have jurisdiction under the Judicial Code in the terms of section 4 or apart from the arbitration agreement, covers matters which would be justiciable in admiralty under section 8.

The canal was used here as a waterway for foreign commerce—from Canada for export. It is a waterway within the scope of the admiralty jurisdiction. The Robt. W. Parsons, 191 U. S. 17, 24 S. Ct. 8, 48 L. Ed. 73. Section 8 is ample authority for entering the decree upon the award. The basis of jurisdiction was a cause of action justiciable in admiralty. The court enjoined the libel filed, and appellant gave the stipulation for value. Section 8 under these circumstances gave free hand to the admiralty jurisdiction, substituting arbitration for trial before the court with the "usual course of admiralty proceedings."

The libel and seizure was a proceeding in rem. There was the direction that the parties proceed with the arbitration and entry of a decree upon the award. The decree necessarily would be in the usual form of a decree in rem, against the res if not released, or against the claimant and stipulators, if the stipulation is substituted for the vessel.

The appellant appears as respondent in the personam libel and as claimant in the in rem proceeding. This practice is common. Merritt & Chapman v. Chubb, etc., Co., 113 F. 173 (C. C. A. 2). The libel was maintainable in rem, and the stipulation given as a substitute for the vessel makes the stipulator liable to the exercise of every authority in the power of the court which it could exercise if the res was still in the court's custody. The Wanata, 95 U. S. 600, 24 L. Ed. 461; The Palmyra, 25 U. S. (12 Wheat.) 1, 6 L. Ed. 531; The Glide, 72 F. 200 (C. C. A. 4); The New York, 104 F. 561 (C. C. A. 6).

Admiralty Rule 8 (Southern District) provides:

"Such stipulation shall contain the consent of the stipulators, that if the libellant or petitioner recover, the decree may be entered against them for an amount not exceeding the amount named in such stipulation and that thereupon execution may issue against their goods, chattels, lands, and tenements or other real estate."

Section 8 of the Arbitration Act contemplated that the liability arbitrated between the parties was a liability that attached to the tug as well as to the owner in personam. The objection that error was committed in entering a decree against the stipulator therefore is without force.

Decree affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

LOUIS DREYFUS and CHARLES DREYFUS, Copartners, etc., Libellants-Appellees,

v.

MARINE TRANSIT CORPORATION, Respondent-Appellant; Diesel Tug Gerald A. Fagan, Marine Transit Corporation, Claimant-Appellant, et al.

DECREE—Filed April 27, 1931

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for

the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, affirmed, with interest and costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,986. U. S. Circuit Court of Appeals, Second Circuit. Term No. 172. Marine Transit Corporation and Tug "Gerald A. Fagan", by Marine Transit Corporation, claimant, petitioner, vs. Louis Louis Dreyfus and Charles Louis Dreyfus, etc. Petition for a writ of certiorari and exhibit thereto. Filed June 20, 1931. File No. 35,986.

FILE COPY

FILED
JUN 2
CHARLES

Supreme Court of the United States

MARINE TRANSIT CORPORATION, and Tug "GERALD A. FAGAN" by MARINE TRANSIT CORPORATION, claimant,

Petitioner,

against

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY.

October Term, 1931
No. **172**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

HORACE L. CHEYNEY,
Counsel for Petitioner.

INDEX

PAGE

Petition for Certiorari 1

Reasons for Granting Petition 6

Brief in Support of Petition:

POINT I.—A certiorari should be granted to review the question of the constitutionality of the Arbitration Act and the decision of the Court below that Congress has full control over all the inferior federal courts and can, by legislation, deprive them of their judicial powers 11

POINT II.—A certiorari should be granted because the decision of the Court below that Congress has power to enlarge the admiralty jurisdiction by conferring upon the district courts in admiralty the power of a court of equity to enforce a contract, is in direct conflict with the uniform decisions of this Court that Congress cannot enlarge the jurisdiction of the admiralty courts 16

POINT III.—The decision of the Circuit Court of Appeals is in direct conflict with the terms of the Arbitration Act which provides in Section 9 that a judgment may be entered upon the award of arbitrators only if the parties have so agreed by their contract for the arbitration 20

POINT IV.—The decision of the Circuit Court of Appeals is in conflict with the provisions of the Arbitration Act because if Section 8 is independent of the other sections of the Act, it confers no power to enter a decree upon the award except in actions in *rem* and upon seizure of property and actions in *personam* and this case involves neither of the situations 23

PAGE

POINT V.—This Court should review the decisions of the Circuit Court of Appeals below that it is not necessary that the award should be signed by all the arbitrators 25

POINT VI.—The decision of the Court below that an admiralty court has jurisdiction to enforce an arbitration of a contract for intrastate carriage is erroneous because under Sections 1 and 2 of the Act, the courts have jurisdiction only over maritime transactions and contracts involving either interstate or foreign commerce 26

POINT VII.—A certiorari should be granted because the decision that execution should issue against the stipulator for the tug, although no decree was entered against the tug, is clearly erroneous and is in conflict with the uniform law upon the subject 30

Appendix.

The United States Arbitration Act 34

Cases Cited.

Atlantic Mutual Ins. Co. v. Alexandre, 16 Fed. 379 32

Black Heath, The, 195 U. S. 361 18

Eclipse, The, 135 U. S. 599 17

Farrell v. Waterman S. S. Co., 291 Fed. 604 15

Harrison v. Hadley, 2 Dill. 229; Fed. Cases 6137 15

Hartford Accident Co. v. Southern Pacific Co., 273 U. S. 277 18

Hollins, In re, 229 Fed. 349 15

Jackson v. Steamboat Magnolia, 20 How. 296 14

Kline v. Burke Construction Co., 260 U. S. 226 15

Kynoch v. The S. C. Ives, New. 205; Fed. Cases 7598 17

PAGE

Lottowanna, The, 21 Wall. 558 17

Manley v. Olney, 32 Fed. 708 15
Mayor, etc. v. Cooper, 6 Wall. 247 15
Morse Dry Dock v. Northern Star, 271 U. S. 552 18

Norwich & N. Y. Transportation Co. v. Wright, 13 Wall. 104 19

Red Cross Line v. Atlantic Fruit Co., 264 U. S. 1091 ..... 15, 17

Shraugher & Johnson v. Phillips Bernard Co., 240 Fed. 131 15

Zip Mfg. Co. v. Pep Mfg. Co., 44 Fed. (2d) 184 27

Text Books Cited.

Benedict's Admiralty, Vol. 2, pp. 490, 491 31

Supreme Court of the United States

MARINE TRANSIT CORPORATION, and Tug "GERALD A. FAGAN" by MARINE TRANSIT CORPORATION, claimant,

Petitioner,

against

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, copartners doing business under the firm name and style of LOUIS DREYFUS & COMPANY.

October Term, 1931
No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petition of the Marine Transit Corporation, individually, and the tug *Gerald A. Fagan*, by the Marine Transit Corporation, respectfully shows to this Court:

This is a petition for a writ of certiorari to review a decision, in admiralty, of the United States Circuit Court of Appeals for the Second Circuit, which affirmed the decree of the United States District Court for the Southern District of New York.

This petition involves, among other things, questions of the constitutionality and construction of the United States Arbitration Act of February 12, 1925. For convenience we are attaching a copy of the Act as an appendix hereto.

The headings which are there inserted are not contained in the original Act. They are taken from the United States Code Annotated and are inserted for convenience in reference.

About July 28, 1928, Dreyfus & Company received at Buffalo, New York, in bond, for export, a shipment of grain from Fort William, Ontario, by a lake vessel. This shipment was stored at Buffalo in the American Elevator, on July 28, 1928 (fol. 492).

About three weeks later, on August 17, 1928, Dreyfus & Company entered into a written agreement with the Marine Transit Company, whereby the latter agreed to furnish insurable canal tonnage for carriage, from Buffalo to New York, of 200,000 bushels of wheat. Dreyfus & Company agreed to pay freight thereon at the rate of 6¼ cents per bushel (fol. 441).

That contract provided that it should be subject to the New York Produce Exchange Canal Grain Charter Party No. 1 as amended (fol. 442). That form of Grain Charter contained the following provision (fol. 596):

> "DISPUTES. All disputes arising under this contract to be arbitrated before the Committee on Grain of the New York Produce Exchange, whose decision shall be final and binding."

About September 13, 1928, 19,200 bushels of grain, part of said shipment of 200,000 bushels, were loaded upon the boat *Edward A. Ryan*, at Buffalo, which had been provided by the Marine Transit Corporation for the carriage of grain under the said contract.

The boat *Ryan* was placed in a fleet with other boats, including the boat *John E. Enright*, which was taken in tow by the tugboat *Gerald A. Fagan*.

While the boat *Ryan* was in tow of the tugboat *Gerald A. Fagan*, on the New York Barge Canal, some mishap occurred in which the boat *Edward A. Ryan* sustained damage in consequence of which it sank with a cargo of wheat on board.

On December 14, 1928, Dreyfus & Company filed a libel in the Southern District of New York in admiralty against the Marine Transit Corporation, in *personam*, the tug *Gerald A. Fagan* in *rem* and the boat *John E. Enright* in *rem*.

A claim was made for the tug *Gerald A. Fagan*, by the Marine Transit Corporation, and a stipulation for value was filed by it, as claimant, in the sum of $26,000 with the Continental Casualty Company, as stipulator.

As the Marine Transit Corporation was sued only in *personam* no stipulation was required of it and none was ever given by it.

Answers were filed by the various respondents. On August 20, 1929, the libellant made a motion for an order referring the disputes between the libellant and the Marine Transit Corporation, the tug *Gerald A. Fagan* and the barge *John E. Enright* to the Committee on Grain of the New York Produce Exchange for arbitration (fol. 75). After hearing, COXE, *J.*, signed an order granting the motion as to the Marine Transit Corporation, only, and denying it to the tug *Gerald A. Fagan* and the barge *Enright*.

On September 6, 1929, an order was entered resettling the order of August 28, 1929, and providing that the Marine Transit Corporation should submit to arbitration before the Committee on Grain of the New York Produce Exchange "any and all issues under the contract dated August 17, 1928, between the Marine Transit Corporation and

Louis Dreyfus & Company for the transportation of 200,000 bushels of wheat from Buffalo to New York" (fol. 82).

Thereafter, under that order the parties mentioned in it appeared before the Grain Committee of the New York Produce Exchange composed of five members (fol. 89). Hearings were had before that committee of five members (fol. 39) at which evidence in behalf of both parties was introduced.

On December 20, 1929, four of said committee signed an award in favor of the libellant and against the Marine Transit Corporation for the sum of $23,016 plus interest amounting to $1,668.66 (fol. 496). This award was not signed by Mr. Walter Trap, one of the members of the Grain Committee, who had taken part in the hearing. There is nothing in the record to show why the award was not signed by him.

Thereafter, on December 23, 1929, counsel for the libellant made a motion in the District Court to confirm that award (fol. 499). Opposing affidavits were filed. After hearing, that motion was granted and a decree was entered confirming the award of the arbitrators and providing that the libellant should recover from the Marine Transit Corporation the sums mentioned in the award (fol. 640).

Although the District Court had denied the motion to submit the issue as to the liability of the tug *Gerald A. Fagan* to arbitration and although there had never been any hearing or trial as to its liability nor any decree against it, nevertheless the decree above mentioned provided that execution should issue against the stipulation of the tug in the following language (fols. 644, 645):

"Further ordered that unless the Marine Transit Corporation, respondent, cause payment to be made within ten days after service of a copy of this order, with notice of entry on proctors for respondent, execution issue against the Marine Transit Corporation and Continental Casualty Company, the stipulator for cost and value, their goods, chattels and lands, to satisfy this decree."

In other words, the Court ordered that execution should issue against the stipulator or the tug, although no decree was entered against it and solely on account of the decree against the Marine Transit Corporation in *personam*.

A motion was made for an order restraining the libellant from recovering from the claimant of the tug *Gerald A. Fagan* or its stipulators under the decree already mentioned. After hearing, this motion was denied in a memorandum by CAFFEY, *J.* (fol. 667).

A formal order was then entered denying the motion and further ordering that the libellant may recover "of and from the Marine Transit Corporation or its stipulators" (fol. 676).

An appeal was taken from the decree of the District Court to the Circuit Court of Appeals which affirmed the decree of the Court below in an opinion by MANTON, *C. J.*

After that decision was handed down a conference was had between MANTON, *J.*, and the proctors for the various parties as to that portion of the opinion relating to execution against the stipulators of the tug *Gerald A. Fagan*.

Subsequently the following letter was received by counsel for the various parties:

UNITED STATES CIRCUIT COURT OF APPEALS

SECOND JUDICIAL DISTRICT

Chambers of
MARTIN T. MANTON,
U. S. Circuit Judge,
New York City

May 30, 1931

Dreyfus v. *Marine Transit*

Macklin, Brown, Lenahan & Speer, Esqs.,
Horace L. Cheyney, Esq.
New York City

Otto & Lyon, Esqs.,
George V. A. McCloskey, Esq.,
New York City

Gentlemen:

I have examined Mr. Cheyney's complaint as to the opinion in the above entitled case, and have decided to let it stand, without change or amendment.

Respectfully,

MARTIN T. MANTON
Circuit Judge.

The petitioner submits that a writ of certiorari should issue in this case because the questions involved are important and of general public interest.

The questions involved are the constitutionality of the Act, its interpretation and the failure of the Court to follow the well established principle of law by decreeing that execution should issue against the stipulator for the tug, although no decree was ever entered against its principal, the tug.

The question of the constitutionality of the Arbitration Act goes to the very foundation of the powers of the inferior federal courts.

Under the decision of the Circuit Court of Appeals, those courts are mere creatures of Congress, which may not only establish them, in accordance with the constitutional provisions, and provide for their jurisdiction when established, but may also, when established, deprive them of all judicial power whatsoever, by taking away the power to hear and determine and convert the judges thereof into mere ministerial or clerical officers.

Our contention is that when inferior federal courts are created by Congress in accordance with the provisions of the Constitution, that the judicial power, including the power to hear and determine, is automatically vested in them under the Constitution and that Congress cannot deprive those courts, when created, of that power.

The second question as to the constitutionality of the Act is whether Congress can confer the jurisdiction of a court of equity upon an admiralty court, as the Arbitration Act gives the district courts, in an admiralty proceeding, the power to enforce specific performance of the agreement for arbitration, a purely equitable remedy.

The Circuit Court of Appeals has sustained the validity of this provision of the Act upon the ground that Congress was enlarging the jurisdiction of the courts of admiralty. That decision is contrary to the well established rule declared by this Court in many cases that Congress cannot enlarge the jurisdiction of the admiralty courts.

So far as concerns the construction of the Act, it may be said that it was not skilfully prepared and is full of defects and ambiguities. As this is the first decision of

any appellate court upon the construction of the Act, the petitioners cannot ask for a review of the decision of the Court below on the ground of conflicting decisions, but as the decision of the Circuit Court of Appeals, in many respects, seems to be in conflict with the Act, if permitted to stand, it is probable that other courts will reach different conclusions and that situation should be avoided by a review of the present decision.

A question of amendment of the Act has been raised before a Committee of the American Bar Association, but it would seem useless for that body to consider amendments until the Act is clearly and definitely construed by this Court.

Amongst other important questions arising as to the construction of the Act, are the following:

First: Whether any district court has power to enter a decree upon the award of arbitrators unless the parties by their provisions have agreed that judgment shall be entered upon it, as provided in Section 9 of the Act.

The Circuit Court of Appeals did not pass upon this question, although it argued both in the briefs and orally.

Second: Whether Section 8 of the Act gives a court of admiralty the power to enter a decree upon the award of arbitrators in any case before it whether or not the parties have agreed that a decree should be entered upon the award, under the provisions of Section 9 of the Act.

Third: If a court of admiralty has that power under the provisions of Section 8 of the Act, whether the power is confined to cases in *rem* only or whether the Court can enter a decree in an action in *personam* as well.

Fourth: Whether the right to arbitration depends upon the contract between the parties to the suit, that is, whether that contract is for interstate or intrastate carriage only or whether the right to arbitration depends upon the nature of the shipment itself, irrespective of the contract for carriage made between the parties.

Fifth: Whether in the absence of any provision of the Act, the award of the arbitrators must be unanimous.

Sixth: Whether under the provisions of the Act, the right to arbitration is confined to those matters which arise out of the terms of the contract itself or whether arbitration may be ordered for loss of the cargo.

The third branch of the case, that is, the decision that execution shall issue against the stipulation for the release of the tug *Fagan* although it is not a party to the arbitration proceeding and no decree has ever been entered against it, may not seem at first glance to be of general public interest, yet going deeper, it is of general public interest because it raises the question whether the Circuit Court of Appeals can disregard the well established principles of law and order execution against a stipulator whose principal has not been held at fault.

Different underwriters are involved in this case. The provision in the decree that execution should issue against the stipulator for the tug *Fagan*, although no decree was ever entered against the latter, has produced a situation of confusion as to the liability of various underwriters, which should be removed by this Court.

WHEREFORE your petitioners pray that this Honorable Court will be pleased to issue its writ of certiorari to the United States Circuit Court of Appeals for the Second

Circuit requiring it to certify and send to this Court a complete transcript of the record and all proceedings in said cause to the end that it may be reviewed and determined by this Honorable Court.

MARINE TRANSIT CORPORATION, personally
and as claimant of tug *Fagan*,
by
HORACE L. CHEYNEY,
Counsel.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

HORACE L. CHEYNEY, being duly affirmed, deposes and says:

That he is counsel for the petitioner, Marine Transit Corporation, and the tug *Gerald A. Fagan.* That he has read a copy of the transcript of record which accompanies this petition, being the transcript of record in the case at bar; that he has carefully examined the foregoing petition for a writ of certiorari; that the allegations and matters stated in said petition are true to the best of his knowledge, information and belief; and that in his opinion, the petition is well founded and the case is one in which the prayer of the petition should be granted by this Court.

HORACE L. CHEYNEY.

Affirmed to and subscribed before
me this 18 day of June, 1931.

BRIEF IN SUPPORT OF PETITION.

POINT I.

A writ of certiorari should be granted to review the question of the constitutionality of the Arbitration Act and the decision of the Court below that Congress has full control over all the inferior federal courts and can, by legislation, deprive them of their judicial powers.

Section 1 of Article 3 of the Constitution, provides as follows:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Section 2 of Article 3 of the Constitution provides that the judicial power shall extend "to all cases of admiralty and maritime jurisdiction".

It is clear that under the provisions of Section 1 of Article 3 that Congress cannot vest any judicial power in any body other than a court duly created under the provisions of the Constitution.

It is well settled that there can be no delegation of the judicial power of the federal courts either by the courts themselves, or by Congress.

The question of the constitutionality of the Arbitration Act may be approached from two points of view.

In the first instance, it may be regarded as an attempt to delegate the judicial power of the courts, and in the second instance, it may be regarded as an attempt to confer judicial power upon some body other than the court.

From either point of view, the Act would seem to be unconstitutional.

The right to hear and determine is of the very essence of the judicial power.

The Act completely deprives the courts of that fundamental right. All that a court of admiralty can do under the decision of the Court below, after ordering arbitration, is to confirm the award of the arbitrators and enter a decree upon it.

The provisions of this Act, therefore, provide for a complete delegation of the judicial power of the courts to the arbitrators.

The question may be approached from the other point of view, that is, as an attempt to vest judicial power in some body other than a court. Viewed from that standpoint the Act is invalid because all judicial power under the Constitution must be vested in the courts.

It is too clear for argument that an arbitrator is not a court, within the meaning of the language of the Constitution.

But the Circuit Court of Appeals has said that arbitration is directed merely to the remedy, and, being a procedural statute was within the power of Congress to enact. There is no question but that arbitration does go to the remedy.

But the decision of the Court below goes even further and holds that under the Constitution, the inferior federal courts are purely the creatures of Congress and that the latter, having the power to regulate procedure, may deprive those courts of the power to hear and determine upon the ground that such legislation relates merely to procedure.

If this view is correct, then Congress may provide that in all jury trials, at common law, the jury shall sit alone without the presence or guidance of the judge.

If Congress has this broad power, as asserted by the Circuit Court of Appeals, then Congress can provide that every admiralty suit shall be referred to a commissioner to hear and determine.

If this contention is true, Congress may go even further and may provide that every admiralty suit brought in the City of New York, shall be referred to the Grain Committee of the New York Produce Exchange, to hear and determine.

Unquestionably, Congress may regulate the procedure of the courts in some respects, but that right is not without limit. It may not under the guise of a statute relating to procedure deprive the courts of their judicial power.

The decision of the Court below is that the judges of the inferior federal courts derive all of their powers from Congress and that the latter may deprive them of the power to hear and determine and convert them into purely ministerial or clerical officers whose sole duty is to enter a decree, upon the determination of some other body.

This view seems to be in direct conflict with the provisions of Section 1 of Article 3 of the Constitution that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time establish.

It must be conceded that the power to hear and determine goes to the very foundation of the judicial power and taking away the power to hear and determine the judicial power becomes completely destroyed.

The Court below attempts to sustain this doctrine by referring to the decisions of this Court holding that while

the Constitution provides that the federal courts shall have jurisdiction over certain classes of cases, that provision is dormant until Congress acts and the federal courts have only such jurisdiction as Congress grants.

The case of *Jackson* v. *Steamboat Magnolia*, 20 How. 296, is cited in support of that argument.

There is no question as to the law upon this subject, as it is well settled that the inferior federal courts have only such jurisdiction as Congress may grant to them.

But it by no means follows that when those courts are created by Congress, that the latter may deprive them of their judicial power and convert them into purely ministerial officers.

The decision of the Court below upon this point is that Congress has complete power and control over the inferior federal courts.

This view presupposes that those courts derive no powers whatsoever from the Constitution.

That theory is, we submit, unsound and not in accordance with the law.

It is true that the establishment of the inferior federal courts and their jurisdiction is solely within the power of Congress, but we submit that when those courts are created by Congress, that they are automatically vested with the judicial power under the provisions of Section 1 of Article 3 of the Constitution, and that while Congress may fail to create the inferior federal courts, that when created, it cannot deprive them of the judicial power under the Constitution.

In other words, Congress, under the Constitution, has the power to create the inferior federal courts, but when so created, they have a status under the Constitution with which Congress cannot interfere.

The theory of the Court below is that the inferior federal courts derive all their jurisdiction and powers from Congress is not in accordance with the authorities upon this subject.

In *Mayor, etc. of Nashville* v. *Cooper*, 6 Wall. 247, Mr. Justice SWAYNE stated the law upon this subject as follows:

> "As regards all Courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the Court the capacity to take it and an Act of Congress must have supplied it. Their concurrence is necessary to vest it."

That statement was referred to with approval by Mr. Justice SUTHERLAND in *Kline* v. *Burke Construction Co.*, 260 U. S. 226.

The same view has been set forth in the following cases:

United States v. *Burlington & Henderson County, etc.*, 29 Fed. 331;
Harrison v. *Hadley*, 2 Dill. 229, Fed. Cases 6137;
Manley v. *Olney*, 32 Fed. 708;
Schrauger & Johnson v. *Phillips Bernard Co.*, 240 Fed. 131;
In re Hollins, 229 Fed. 349;
Farrell v. *Waterman S. S. Co.*, 291 Fed. 604.

It is said in the opinion of the Circuit Court of Appeals, as follows:

> "The validity of a clause providing arbitration under the New York Arbitration Act was held no constitutional impediment in the Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109."

That case arose under the arbitration laws of the State of New York and does not concern the Federal Arbitration Act at all. We find nothing in the opinion sustaining the statement that this Court held that there was no constitutional impediment against an arbitration clause. The question was not raised in this Court or discussed in its opinion. That case concerned only the question whether an arbitration could be had under the New York statute in the courts of that State upon a maritime contract. The Court of Appeals of New York held that such contracts fell exclusively within admiralty jurisdiction, but this Court, reversing the Court of Appeals, held otherwise.

POINT II.

A certiorari should be granted because the decision of the Court below that Congress has power to enlarge the admiralty jurisdiction by conferring upon the district courts in admiralty the power of a court of equity to enforce a contract, is in direct conflict with the uniform decisions of this Court that Congress cannot enlarge the jurisdiction of the admiralty courts.

Section 4 of the Arbitration Act provides that any federal court in which an action is pending, may, upon petition, enter an order for arbitration if the parties have by their contract, agreed that the matters in dispute shall be arbitrated.

The power to enforce specific performance of a contract is certainly one which is not vested in a court of admiralty, under the well established law as to its jurisdiction.

While the admiralty courts may apply equitable principles in cases falling within their jurisdiction, yet they have not the characteristic powers of a court of equity.

The Eclipse, 135 U. S. 599.

They cannot enforce specific performance.

Kynoch v. *The S. C. Ives*, New. 205; Fed. Cases No. 7958;
Red Cross Line v. *Atlantic Fruit Co.*, 264 U. S. 109.

The Court below, however, has sustained the power of an admiralty court to enforce specific performance by saying as follows (fol. 241):

> "The Act does not deprive the District Court of jurisdiction, but it seems to enlarge that jurisdiction so as to embrace the enforcement of arbitration agreements not only by ordering such arbitration to proceed, but by entering a decree upon this award."

This statement is in direct conflict with the uniform decisions of this Court that Congress cannot enlarge the jurisdiction of the courts of admiralty and that the determination of what matters fall within the jurisdiction of the court of admiralty, is a purely judicial question.

The law upon this subject is stated as follows by Mr. Justice BRADLEY in *The Lottawanna*, 21 Wall. 558:

> "The question as to the true limits of maritime law and admiralty jurisdiction is, undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no state law or Act of Congress can make it broader, or (it may be added) narrower,

> than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received, as law in the maritime usages of this country, and on such legislation as may have been competent to affect it."

A similar statement of the law was made by Mr. Justice Holmes in *The Black Heath*, 195 U. S. 361.

It is said in the opinion of the Court below as follows:

> "A power under S. 8 to enforce specific performance in a contract is but a remedy incident to jurisdiction under the Act. (Hartford Accident v. Southern Pacific, 273 U. S. 277; Morse Dry Dock v. Northern Star, 271 U. S. 552.)"

There is nothing in the decisions of this Court in those cases supporting the contention that a court of admiralty has power to enforce specific performance as a remedy incident to its jurisdiction.

The case of *Morse Dry Dock Company* v. *Northern Star*, *supra*, involved only the construction of the Preferred Mortgage Act, and largely the question of relative priority of preferred mortgages and liens.

The constitutionality of the Preferred Mortgage Act was not even suggested in the case. Its constitutionality is still open to question. It is unnecessary at this time to enter into any discussion of its constitutionality, but in view of the previous decisions of this Court upon the subject, the constitutionality of some of its provisions is subject to grave doubt.

Nor is there anything to be found in the decision in the *Hartford Accident* case, *supra*, which supports this theory

that specific performance is only a remedy incident to jurisdiction.

That case was one of limitation of liability. This Court held that a court of admiralty, in working out its jurisdiction, acquired the right to marshal all claims and that upon dismissing the petition, it might, at its discretion, retain jurisdiction over the whole subject matter. But we find nothing in the case which supports the theory propounded by the Court below.

Probably the latter had in mind the right to grant an injunction in limitation proceedings, restraining claimants from bringing suit elsewhere, than in the court in which the limitation proceeding is pending.

But that provision does not empower an admiralty court to enforce specific performance as an incident to its jurisdiction.

This Court long ago held that a proceeding for limitation of liability is within the constitutional grant of power to Congress to establish courts of admiralty and maritime jurisdiction.

Norwich & N. Y. Transportation Co. v. *Wright*, 13 Wall. 104.

But in the present case, the court of admiralty has no power to enforce specific performance nor can Congress grant that right.

As this Court held that the limited liability law was within the power of Congress to enact, the provision for an injunction was one only for the protection of the jurisdiction of the Court. In such proceedings, a monition issues against all parties to bring their claims into the limitation proceedings.

Every court, including a court of admiralty, has inherent power to punish for contempt and the injunction issued in the limitation proceedings is merely notice to all parties that they must bring their claims within the admiralty and not elsewhere and that they shall be subject to contempt if they act otherwise.

POINT III.

The decision of the Circuit Court of Appeals is in direct conflict with the terms of the Arbitration Act which provides in Section 9 that a judgment may be entered upon the award of arbitrators only if the parties have so agreed by their contract for the arbitration.

Section 9 of the Arbitration Act provides that judgment may be entered upon the award of the arbitrators only "if the parties in their agreement have agreed that a judgment of the Court shall be entered upon the award."

There was no agreement of that kind in this case, as the contract provided for no more than the arbitration of disputes under the contract (fol. 596).

It is our understanding that the framers of the Federal Arbitration Act in this respect followed that provision of the arbitration law of the State of New York, now contained in Section 1449 of the Civil Practice Act, which provides that judgment may be entered upon the award of arbitrators only where the parties have so agreed by their submission.

This question was fully argued in the Circuit Court of Appeals, both orally and in the briefs, but notwithstanding its importance in the case, it is not even referred to in the opinion.

It has been contended that Section 8 of the Act relating to procedure in admiralty cases is entirely independent of the other sections of the Act and the provisions of Section 9, therefore, do not apply to those cases within the admiralty jurisdiction under Section 8.

This contention is that once a court of admiralty has acquired jurisdiction, its actions are not affected by the other sections of the Act and it may do just about as it pleases.

While it is not directly stated in the opinion of the Circuit Court of Appeals, that it upheld this theory that Section 8 was independent of all of the other provisions of the law, yet its decision is consistent only with that theory.

The fallacy of that theory is too obvious for much discussion.

Two illustrations will suffice to show its error.

If Section 8 is entirely independent of all other sections of the Act, then the District Court sitting in admiralty had no power to order arbitration at all as Section 8 by its provisions grants no such power.

It is clear that a court of admiralty has no inherent power to force an arbitration agreement and therefore if it has that power, it must be conferred by some provision of the Act.

That power is granted, not by Section 8, but by Section 4 of the Act, which specifically provides that any court having jurisdiction "at law, in equity, or in admiralty may enter an order for arbitration upon the agreement".

It must be admitted, therefore, that in this respect, at least, the provisions of Section 8 are not entirely independent of the provisions of the other section of the Act but are connected with them. The Circuit Court of Appeals so admits as it says that the power to enforce arbitration is given by Section 4, although Section 8 does not refer to it.

If this contention that Section 8 of the Act is independent of the other sections and therefore, the provisions of Section 9 that judgment may be entered upon award only where the parties have so agreed, has no application to suits in admiralty commenced under the provisions of Section 8, then a court of admiralty has no power to vacate, modify or correct an award upon the grounds set forth in Sections 10 and 11 because under the provisions of Section 9, those sections apply only to proceedings under it.

If the contention that under the provisions of Section 9 a judgment may be entered upon award only where the parties have so agreed do not apply to suits in admiralty, then a most anomalous condition is created.

If the libellants had brought suit at law against the Marine Transit Company upon the contract involved in this case, no judgment could have been entered upon the award under the provisions of Section 9 because the parties did not stipulate that judgment should be entered.

But according to this theory, the libellants are entitled to have a decree entered because the suit is in admiralty when one could not have been entered in an action at law.

Certainly, neither Congress nor the framers of the Act intended to bring about such a result.

The purpose of Section 8 of the Act is clear enough.

The sole and clear purpose of Section 8 was to provide that if the subject matter of the suit was such as to fall within the jurisdiction of the admiralty that a suit might be commenced in the manner peculiar to the admiralty, namely, by an action in *rem*.

Where the admiralty court has acquired jurisdiction by a seizure in *rem*, all of the provisions of the Act are applicable to the suit.

POINT IV.

The decision of the Circuit Court of Appeals is in conflict with the provisions of the Arbitration Act, because if Section 8 is independent of the other sections of the Act, it confers no power to enter a decree upon the award except in actions in *rem* or upon seizure of property in an action in *personam* and this case involves neither of the situations.

In order to properly understand this point, it is necessary to make a short restatement of facts as the opinion of the Circuit Court of Appeals gives an erroneous impression of them. It would be inferred by anyone reading the opinion of the Circuit Court of Appeals that some action in *rem* was involved in its decision.

Such was not the case.

The Marine Transit Corporation entered into a written contract with Dreyfus & Co. whereby it agreed to carry 200,000 bushels of wheat from Buffalo to New York (fol. 73). In part fulfillment of that contract, the Marine Transit Corporation received on board the *Edward A. Ryan,* 19,200 bushels of wheat (fol. 493). That boat was taken in tow with some others by the tug *Gerald A. Fagan.* Some mishap occurred in the New York Barge Canal whereby the *Ryan* sank with its cargo.

Dreyfus & Company filed a libel to recover for the loss of cargo against the following parties:

(1) Marine Transit Corporation in *personam;* (2) Tug *Gerald A. Fagan* in *rem;* (3) The barge *John E. Enright* (another boat in the tow) in *rem.*

The libel as to the tug *Fagan* and barge *Enright* was not based upon any contract at all but sounded in tort only as the libel alleged certain specific acts of negligence on the part of each of them. (See libel, fols. 19 *et seq.*)

A motion was made by libellant to send to arbitration the issues under the answers of all of the respondents. This action was properly denied by Coxe, *J.*, who sent to arbitration only the question of the liability of the Marine Transit Corporation in *personam* and denied the motion as to the actions in *rem* against the tug *Fagan* and the barge *Enright*.

The arbitration proceeding was as to the Marine Transit Corporation only in *personam* (fol. 88) and the arbitrators made an award against the Marine Transit Corporation only.

There never was any adjudication of the acts in *rem* against the tug *Fagan* although the opinion of the Circuit Court of Appeals indicates otherwise.

Assuming, therefore, that under the provisions of Section 8, a court of admiralty can enter a decree contrary to the provisions of Section 9, where the parties have not stipulated that a judgment shall be entered in an award, can it enter a decree in an action in *personam* if no property has been attached?

No property of the Marine Transit Corporation was attached and could not have been under the admiralty procedure, because it was alleged in the libel that it was a corporation existing under the laws of the State of New York.

Section 8 of the Act does not cover the entire field of admiralty jurisdiction, as it is limited to two phases of it; one, a proceeding in *rem* by seizure of the vessel, and two,

by an attachment of property of the respondent upon suit in *personam*, where an attachment will lie. It does not cover ordinary action in *personam*, where there is no attachment of property.

Therefore, if a court of admiralty, under the provisions of Section 8, has power to enter a decree upon the award in certain cases, notwithstanding the parties have not so agreed, it is clear that it is granted no such power by that section to enter a decree in an action in *personam* where no property has been attached because the provisions of Section 8 do not include actions in *personam*, where no seizure of property has been made.

POINT V.

This Court should review the decision of the Court below that it is not necessary that the award should be signed by all the arbitrators.

The arbitration was had before five members of the Grain Committee, including Mr. Walter Trapp (fol. 89). Mr. Trapp did not sign the award.

The Act contains no provision upon this subject although the Arbitration Act of the State of New York, which we understand was largely followed in the preparation of the Federal Act, does contain a provision that a majority of the arbitrators may make an award.

With this provision of the New York statute before them, the framers of this Act inserted no similar provision and it is a fair presumption, therefore, that they intended that the award of the arbitrators should be unanimous.

It is said in the opinion of the Court below, that it is not necessary that the award should be unanimous and that "a committee of four out of five signed the award" (Rec., p. 242).

Aside from any inference that it was the purpose of Congress to require unanimity of award, we submit that in the absence of any provision on the subject, unanimity is necessary.

A board of arbitrators is very similar to a jury and in the absence of any provision on the subject in the Arbitration Act, it is to be fairly assumed that Congress intended that the award of arbitrators, like the verdict of a jury, should be unanimous.

POINT VI.

The decision of the Court below that an admiralty court has jurisdiction to enforce an arbitration of a contract for intrastate carriage is erroneous because under Sections 1 and 2 of the Act, the courts have jurisdiction only over maritime transactions and contracts involving either interstate or foreign commerce.

This point raises the same question which is involved in some of the other points, namely, whether the provisions of Section 8 are entirely independent of the provisions of all other sections of the Act, because not specifically referred to in it, or whether its provisions must be read in connection with the other sections.

The following statement is made in the opinion of the Circuit Court of Appeals:

> "The parties claiming to be aggrieved at bar were the appellees as they applied under S. 8 of the arbitration act because of the appellant's failure, neglect or refusal * * * to arbitrate under a written agreement for arbitration (S. 4) and nothing in either section 4 or 8 confines such written agreements for arbitration to agreements involving maritime transactions in a limited sense."

This decision of the Court is contrary to the decision of NIELDS, *D. J.* (District of Delaware), in *Zip Mfg. Co.* v. *Pep Mfg. Co.*, 44 Fed. (2d) 184. That was a patent case and a motion was made for arbitration, which was denied.

It was held by the Court that all sections of the Act were to be construed together and harmonized if possible and that no arbitration could be ordered except in cases falling within the terms of Sections 1 and 2 of the Act.

Section 1 of the Act defines maritime transactions as "charter parties, etc." or any other matters in foreign commerce, which if the subject of controversy, would be embraced within admiralty jurisdiction. In that section, commerce is defined as meaning interstate or foreign commerce. Neither of these sections apply to purely intrastate transactions or commerce. What is the purpose of the insertion of Sections 1 and 2 of the Act, unless its other sections were to be construed in connection therewith?

It was argued by the appellee in the Court below that the purpose of these two sections was merely to validate arbitration agreements so that they could be enforced anywhere. In other words, the contention was that the purpose of Congress in inserting the provisions of Sections 1 and 2 was to validate and confer jurisdiction upon the High

Court of Justice of England, amongst others, if the parties saw fit to bring suit in England.

The opinion of the Court below concedes that the provisions of Section 8 are not complete and do not confer power to order arbitration and that that power is conferred only by Section 4 of the Act, which must be read in connection with Section 8.

The question arises why if Section 4 must be read in connection with the provisions of Section 8, why Sections 1 and 2 must not also be read in connection with it.

As we have argued heretofore, the plain purpose of Section 8 was merely to permit actions to be brought in a court of admiralty in *rem* or by the attachment of property and it does not in any way give unlimited jurisdiction to the admiralty; in fact, it does not relate to jurisdiction over the subject matter at all.

Although the Court below has found that the provisions of Sections 1 and 2 have no bearing whatsoever upon admiralty actions under Section 8, the opinion further proceeds to consider the question whether or not this contract fell within the provisions of Sections 1 and 2.

It is said in the opinion of the Circuit Court of Appeals, as follows:

> "But it is said that the grain was not established to be for foreign shipment."

We have made no such contention. What we did argue was that the contract made between these parties was for intrastate carriage and that under the provisions of Sections 1 and 2, the question was as to the character of the contract and not the nature of the shipment.

The facts of the case are very simple and may be briefly restated.

The grain which was lost was carried from Fort William, Ontario, to Buffalo by lake steamer, which arrived at Buffalo about July 24th, 1928. There is no evidence of any through bill of lading in the case.

The steamer carrying the cargo to Buffalo issued a local bill of lading.

The grain was stored in the American elevator at Buffalo on July 28, 1928 (fol. 492), and nearly three weeks later, on August 17, 1928, Dreyfus & Co. and the Marine Transit Corporation entered into a contract for the carriage of 200,000 bushels of wheat from Buffalo to New York.

The contract made was for purely intrastate carriage from Buffalo to New York (fol. 439), and a bill of lading was issued by the Marine Transit Corporation for the carriage of the cargo which was lost, to New York (fol. 487).

It may well be that for certain purposes, that this shipment so far as concerned Dreyfus & Company, was a foreign one, but that fact has no bearing upon the right to arbitration under the provisions of the Act because it confers power to enforce arbitration only where the contract made between the parties relates to foreign or interstate commerce.

The nature of the shipment has no connection whatsoever with the right to arbitration under the Act.

It is also said in the opinion that the Barge Canal was a waterway for foreign commerce. There is no question about that fact, but it has no bearing whatsoever upon the right to arbitration under the Act. That concerns only the admiralty jurisdiction.

POINT VII.

A certiorari should be granted because the decision that execution should issue against the stipulator for the tug, although no decree was entered against the tug, is clearly erroneous and is in conflict with the uniform law upon the subject.

The statements in the opinion of the Circuit Court of Appeals as to the proceedings are misleading. It might be inferred from those statements that the tug *Fagan* was a party to the arbitration proceedings, which was not a fact.

The opinion also fails to make clear that the Marine Transit Corporation appealed in two different capacities. First, from the judgment against it in *personam,* and second, as claimant of the tug *Fagan.* The latter appeal related to the decree of the District Court that execution should issue against the stipulators for the tug.

The tug *Fagan* was sued in *rem.* A stipulation for its value in the sum of $26,000.

Libellant made a motion to refer the issues as to the Marine Transit Corporation, in *personam,* and the tug *Fagan* in *rem,* to arbitration. The Court granted the motion as to the Transit Corporation, in *personam,* and denied it as to the tug. The arbitration, therefore, proceeded against the Marine Transit Corporation in *personam* only. The arbitration was had as to it only. The award was against it only. The Court, in confirming the award, entered a decree against it only.

But, nevertheless, the Court, by its decree, directed that execution should issue against the stipulator for value of

the tug, although the tug was not a party to the arbitration proceeding, nor was there any decree against it.

This portion of decree violates not only the uniform practice of the admiralty, but all of the well-established principles of law. Nothing is better settled than that a stipulator or surety is liable only for the default of its principal.

In this case, the principal of the stipulator was the tug *Fagan* and its liability has never been adjudged in any way whatsoever, nor has any decree been entered against it.

The Court says in the opinion that the libel and seizure was a proceeding in *rem*, which it undoubtedly was, but that does not alter the situation as the action in *rem* was never tried.

It is said in the opinion of the Circuit Court of Appeals that the stipulation given for the release of the tug was a substitute for the vessel which made the stipulation liable to the exercise of every authority in the power of the Court which it could exercise if the *res* was still in the Court's custody.

There is no question about this principle of law, but it has not the slightest application to the facts of this case. If no stipulation had been given for the release of the tug and it had remained in the custody of the Court, the latter would have been powerless to enter any decree against it without hearing and determination of its liability.

The law and practice upon this subject is too well established to require much discussion.

In actions in *rem*, the final decree runs against the vessel with provision for execution against the stipulator for its release. (See form Benedict's Admiralty, Vol. 2, pp. 490-491.)

No decree can be entered against the claimant of a vessel, personally, but if he has signed the stipulation, he is, of course, liable upon it.

Atlantic Mut. Ins. Co. v. *Alexandre*, 16 Fed. 379.

It so happens in this case that the Marine Transit Corporation, which was sued in *personam*, was also the owner of the tug *Fagan* and made claim for it. But that does not alter the situation. It had two distinct identities in the case.

The stipulator cannot be bound except by the terms of his stipulation, and by the stipulation it did not agree to pay upon default of the Marine Transit Corporation. It agreed to pay only in the event of a final decree against the tug *Fagan* and there has been none.

The opinion of the Circuit Court of Appeals indicates a misapprehension of the facts of the case, and if there was any such misapprehension, it was removed at the conference with MANTON, *J.*, quoted in the petition. But as shown by his letter of May 20, 1931, to counsel, the error has still remained.

There was one statement in the opinion apparently relating to this point to which attention is called because it shows an erroneous impression as to arbitration under the Act.

It is said in the opinion as follows (Rec., p. 244):

> "Section 8 of the Arbitration Act contemplated that the liability arbitrated between the parties was a liability that attached to the tug as well as to the owner in personam."

In other words, this is a decision that notwithstanding the District Court declined to submit the issue as to the

tug's liability to arbitration because it was not a party to the contract, nevertheless the tug was a party to the arbitration proceedings.

The fallacy of this decision is so obvious that it requires no consideration.

It is true that Section 8 of the Arbitration Act covers arbitration where there is a proceeding in *rem* against a vessel.

But the construction of that section by the Circuit Court of Appeals apparently is that the courts have power to order arbitration in any case in *rem* in admiralty whether any agreement for arbitration exists or not.

Clearly the Act cannot be given any such construction.

Owing to the fact that there are different underwriters involved in this case, the decree providing that execution should issue against the stipulator of the tug, has created a situation of confusion. This confusion should be removed by the application of the proper principles of law, and it is submitted that as this error has not been corrected below, that it should be corrected by this Court.

LASTLY.

It is respectfully submitted that a writ of certiorari should be granted to review the decision of the Circuit Court of Appeals in this case.

HORACE L. CHEYNEY,
Counsel.

APPENDIX.

THE UNITED STATES ARBITRATION ACT

Act of Congress, February 12, 1925, C. 213, Sec. 41, Title 9, U. S. Code of Law.

An Act to make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED:

Section 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title.

"Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Sec. 2. Validity, irrevocability and enforcement of agreements to arbitrate.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Sec. 3. Stay of proceedings where issue therein is referable to arbitration.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Sec. 4. Failure, etc., to arbitrate under agreement; petition to United States Court having jurisdiction to compel arbitration; notice and service thereof; hearing and determination.

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, safe for such agreement, would have jurisdiction

under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for the service of summons in the jurisdiction in which the proceeding is brought. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement PROVIDED, That the hearing and proceedings under such agreement shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agree-

ment for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Sec. 5. Appointment of arbitrators or umpire.

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

Sec. 6. Application heard on motion.

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

Sec. 7. Witnesses before arbitrators; fees; compelling attendance.

The arbitrators selected either as prescribed in this Act or otherwise, or a majority of them, may summon in

writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States court and for the district in which such arbitrators, or a majority of them, are sitting, may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner now provided for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

Sec. 8. Proceedings began by libel in admiralty and seizure of vessel or property.

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

Sec. 9. Award of arbitration; confirmation; jurisdiction; procedure.

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in the next two sections. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a non-resident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the Court.

Sec. 10. Same; vacation; grounds; rehearing.

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Sec. 11. Same; modification or correction; grounds; order.

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration:

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

Sec. 12. Notice of motions to vacate or modify; service; stay of proceedings.

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a non-resident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

Sec. 13. Papers filed with order on motion; judgment; docketing; force and effect; enforcement.

The party moving for an order confirming, modifying or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk;

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

Sec. 14. Citation of title.

This Act may be referred to as "The United States Arbitration Act."

Sec. 15. Contracts not affected.

All Acts and parts of Acts inconsistent with this Act are hereby repealed, and this Act shall take effect on and after the 1st day of January next after its enactment, but shall not apply to contracts made prior to the taking effect of this Act.

FILE COPY

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CHARLES ELMORE C

Supreme Court of the United States

OCTOBER TERM, 1931—No. 172.

MARINE TRANSIT CORPORATION and Tug "GERALD A. FAGAN" by MARINE TRANSIT CORPORATION, Claimant, Petitioner,

against

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, etc.

BRIEF OF MARINE TRANSIT CORPORATION, PETITIONER.

HORACE L. CHEYNEY,
Counsel for Petitioner.

CORPORATE PRESS, INC., New York City

INDEX.

	PAGE
REFERENCE TO OFFICIAL REPORTS OF THE OPINIONS BELOW	1
STATEMENT OF THE CASE	1
THE FACTS	2
THE PROCEEDINGS	3
STATEMENT OF ERRORS RELIED UPON	6
ARGUMENT.	
POINT I. The law before the enactment of the Arbitration Act	8
POINT II. The Arbitration Act is unconstitutional because it deprives the Federal courts of their judicial power and gives it to laymen	9
POINT III. The Court below erred in holding that Congress had the power to enlarge the jurisdiction of the admiralty courts by conferring upon them the equitable power of specific performance	15
POINT IV. The Court erred in holding that the provisions of Section 8 of the Act are independent of the other provisions of the Act, instead of construing the Act as a whole, and, it especially erred because Section 8 of the Act has no application to this case	18
POINT V. The decision of the Circuit Court of Appeals is in direct conflict with the terms of the Arbitration Act which provides in Section 9 that a judgment may be entered upon the award of arbitrators only if the parties have so agreed by their contract for arbitration	22

PAGE

POINT VI. The decision of the Court below that an admiralty court has jurisdiction to enforce the arbitration of a contract for intra-state carriage is erroneous because under Section 1 of the Act, the Courts have jurisdiction only over maritime transactions and contracts involving either interstate or foreign commerce 23

POINT VII. The Court below erred in holding that execution should issue against the stipulator for the tug, although no decree was entered against the tug, is clearly erroneous and is in conflict with the uniform law upon the subject 26

POINT VIII. The Court erred in holding it was not necessary that the award should be signed by all the arbitrators 27

Appendix.

THE UNITED STATES ARBITRATION ACT (in full) 31

Cases Cited.

	PAGE
Atlantic Mutual Ins. Co. v. Alexander, 16 Fed. 379 ..	27
Bakelite Corporation, Ex parte, 279 U. S. 438	14
Black Heath, The, 195 U. S. 361	16
Eclipse, The, 135 U. S. 599	15
Farrell v. Waterman S. S. Co., 291 Fed. 604	13
Harrison v. Hadley, 2 Dill. 229; Fed. Cases 6137	13
Hartford Accident Co. v. Southern Pacific Co., 273 U. S. 277	17
Hollins, In re, 220 Fed. 349	13
Jackson v. Steamboat Magnolia, 20 How. 296	12
Kline v. Burke Construction Co., 260 U. S. 226	15
Kynoch v. The S. C. Ives, New. 205; Fed. Cases 7598	15
Lottowanna, The, 21 Wall. 558	16
Manley v. Olney, 32 Fed. 708	13
Mayor, etc. v. Cooper, 6 Wall. 247	13
Morse Dry Dock v. Northern Star, 271 U. S. 552	17
Norwich & N. Y. Transportation Co. v. Wright, 13 Wall. 104	17
Red Cross Line v. Atlantic Fruit Co., 264 U. S. 1091	8, 15
Straugher & Johnson v. Phillips Bernard Co., 240 Fed. 131	13
United States v. Burlington, etc., 29 Fed. 331	13
Zip Mfg. Co. v. Pep Mfg. Co., 44 Fed. (2d) 184 ...	19, 24

Text Books Cited.

PAGE

Benedict's Admiralty, Vol. 2, pages 490, 491 27

Statutes Referred To.

ACT OF CONGRESS OF FEBRUARY 12, 1925, C. 213, SEC. 41:

Section 1..... 18, 19-24

Section 2..... 24

Section 4..... 15, 19, 21

Section 8..... 15, 19, 20, 21, 22, 23, 24

Section 9..... 19, 22

Section 10..... 9

Section 11..... 9

Supreme Court of the United States

October Term, 1931—No. 172.

MARINE TRANSIT CORPORATION and Tug "GERALD A. FAGAN" by MARINE TRANSIT CORPORATION, Claimant, Petitioner,

against

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, etc.

BRIEF OF MARINE TRANSIT CORPORATION, PETITIONER.

Reference to Official Reports of the Opinions Delivered in the Courts Below.

The opinion of the Circuit Court of Appeals by MANTON, *C. J.*, is reported under the title of The Gerald A. Fagan, 49 Fed. (2d) 215.

None of the decisions in the District Court is reported.

Statement of the Case.

This case concerns the constitutionality and construction of the Federal Arbitration of February 12, 1925, C. 213, Sec. 41; Title 9. U. S. Code of Law.

For convenience, we are attaching a copy of the Act as an appendix hereto.

The headings which are there inserted are not contained in the original act. They are taken from the United States Code Annotated and are inserted for convenience in reference.

The Facts.

It appears from the bill of lading (Marine Exhibit 3, p. 163, at pp. 164-165) that on July 28, 1928, Dreyfus & Company received at Buffalo, N. Y., in bond, for export, a shipment of grain from Fort William, Ontario, by the steamer *Pioneer*.

A lake bill of lading was issued, covering the carriage of the grain between Fort William and Buffalo (p. 165).

This grain was stored in the American elevator at Buffalo on July 28, 1928.

About three weeks later on August 17, 1928, Dreyfus & Company entered into a written agreement with the Marine Transit Company whereby the latter agreed to furnish insurable tonnage for carriage from Buffalo to New York, of about 200,000 bushels of wheat. (See Dreyfus Exhibit 1, p. 147). Dreyfus & Co. agreed to pay freight on the grain at the rate of 6¼¢ per bushel (p. 147). The contract provided that it should be subject to the New York Produce Exchange Grain Charter Party No. 1 as amended. (See p. 148.)

That form of Grain Charter contained the following provision: (Dreyfus Exhibit 2, p. 149, at p. 156):

> "DISPUTES: All disputes arising under this contract to be arbitrated before the Committee on Grain of the New York Produce Exchange whose decision shall be final and binding."

About September 13, 1928, 19,200 bushels of grain, part of the said shipment of 200,000 bushels, were loaded upon the boat *Edward A. Ryan* at Buffalo, which had been provided by the Marine Transit Corporation for the carriage of grain to New York under the aforesaid contract.

A bill of lading covering his shipment was issued. (See Marine Exhibit C, p. 163.)

The boat *Ryan* was placed in a fleet of boats, including the boat *John E. Enright*, which was taken in tow by the tug *Gerald A. Fagan*. While the boat *Ryan* and the other boats were in tow of the tugboat *Gerald A. Fagan* on the New York Barge Canal, some mishap occurred, in which the boat *Edward A. Ryan* sustained damage, in consequence of which it sank, with the cargo of wheat on board.

The Proceedings.

On December 14, 1928, Dreyfus & Company filed a libel in the Southern District of New York in admiralty against the Marine Transit Corporation, in *personam*, the tug *Gerald A. Fagan* in *rem* and the boat *John E. Enright* in *rem*.

This libel was in the common form of admiralty libels and asked only the relief usually prayed for in such libels.

It contained no prayer asking for arbitration.

A claim was made for the tug *Gerald A. Fagan*, by the Marine Transit Corporation, its owner, and a stipulation for value was filed by it, as claimant, in the sum of $26,000, with the Continental Casualty Company, as stipulator.

As the Marine Transit Corporation was sued only in *personam* no stipulation was required of it and none was ever given by it.

Answers were filed by the various respondents.

On August 20, 1929, the libellant made a motion for an order referring the disputes between the libellant and the Marine Transit Corporation, the tug *Gerald A. Fagan* and the barge *John E. Enright* to the Committee on Grain of the New York Produce Exchange for arbitration (p.

25c). After hearing, Coxe, *J.*, signed an order granting the motion as to the Marine Transit Corporation, only, and denying it to the tug *Gerald A. Fagan* and the barge *Enright* (p. 251).

On September 6, 1929, an order was entered resettling the order of August 28, 1929, and providing that the Marine Transit Corporation should submit to arbitration before the Committee on Grain of the New York Produce Exchange "any and all issues under the contract dated August 17, 1928, between the Marine Transit Corporation and Louis Dreyfus & Company for the transportation of 200,000 bushels of wheat from Buffalo to New York" (p 28).

Thereafter, under that order, the parties mentioned in it appeared before the Grain Committee of the New York Produce Exchange composed of five members (p. 30). Hearings were had before that committee of five members (p. 88) at which evidence on behalf of both parties was introduced.

On December 20, 1929, four of said committee signed an award in favor of the libellant and against the Marine Transit Corporation for the sum of $23,016 plus interest amounting to $1,668.66 (p. 166).

This award was not signed by Mr. Walter Trap, one of the members of the Grain Committee, who had taken part in the hearings. There is nothing in the record showing why the award was not signed by him.

Thereafter, on December 23, 1929, counsel for the libellant made a motion in the District Court to confirm that award (p. 167). Opposing affidavits were filed. After hearing, that motion was granted and a decree was entered confirming the award of the arbitrators and providing that the libellant should recover from the Marine Transit Corporation the sums mentioned in the award (p. 214).

Although the District Court had denied the motion to submit the issue as to the liability of the tug *Gerald A.*

Fagan to arbitration and although there had never been any hearing or trial as to its liability, nor any decree against it, nevertheless the decree above mentioned provided that execution should issue against the stipulation of the tug in the following language (p. 215):

> "Further ordered that unless the Marine Transit Corporation, respondent, cause payment to be made within ten days after service of a copy of this order, with notice of entry on proctors for respondent, execution issue against the Marine Transit Corporation and Continental Casualty Company, the stipulator for cost and value, their goods, chattels and lands, to satisfy this decree.

In other words, the Court decreed that execution should issue against the stipulator for the tug, although no decree was entered against it and solely on account of the decree against the Marine Transit Corporation in *personam*.

A motion was made for an order restraining the libellant from recovering from the claimant of the tug *Gerald A. Fagan* or its stipulators under the decree already mentioned (p. 216). After hearing, this motion was denied in a memorandum by CAFFEY, *J.* (p. 223).

A formal order was then entered denying the motion and further ordering that the libellant should recover "of and from the Marine Transit Corporation or its stipulators" (p. 226).

An appeal was taken from the decree of the District Court to the Circuit Court of Appeals which affirmed the decree of the Court below in an opinion by MANTON, *C. J.*

After that decision was handed down a conference was had between MANTON, *J.*, and the proctors for the various parties as to that portion of the opinion relating to execution against the stipulators of the tug *Gerald A. Fagan*.

Subsequently the following letter was received by counsel for the various parties:

UNITED STATES CIRCUIT COURT OF APPEALS
SECOND JUDICIAL DISTRICT

Chambers of
MARTIN T. MANTON,
U. S. Circuit Judge,
New York City

May 30, 1931

Dreyfus v. Marine Transit

Macklin, Brown, Lenahan & Speer, Esqs.,
Horace L. Cheyney, Esq.
New York City
Otto & Lyon, Esqs.,
George V. A. McCloskey, Esq.,
New York City

Gentlemen:

I have examined Mr. Cheyney's complaint as to the opinion in the above entitled case, and have decided to let it stand, without change or amendment.

Respectfully,

MARTIN T. MANTON
Circuit Judge.

Statement of Errors Relied Upon.

1. The Arbitration Act is unconstitutional because it deprives the Federal Courts of their judicial power and gives it to laymen.

2. The Court below erred in holding that Congress has the power to enlarge the jurisdiction of the admiralty courts by conferring upon them the equitable power of specific performance.

3. The Court below erred in holding that the provisions of Section 8 of the Act are independent of the other sections of the Act, instead of construing the Act as a whole; and it especially erred because Section 8 of the Act has no application to this case.

4. The decision of the Circuit Court of Appeals is in direct conflict with the terms of the Arbitration Act, which provides in Section 9 that a judgment may be entered upon the award of the arbitrators only if the parties have so agreed in their contract for arbitration.

5. The decision of the Court below that an admiralty court has jurisdiction to enforce arbitration of a contract for intra-State commerce is erroneous because under Section 1 of the Act, the courts have jurisdiction only over maritime transactions and contracts involving either interstate or foreign commerce.

6. The decree of the Court below that execution should issue against the stipulator for the tug although no decree was entered against the tug is clearly erroneous and is in conflict with the uniform law upon the subject.

7. The Court erred in holding that it was not necessary that the award should be signed by all the arbitrators.

ARGUMENT.

POINT I.

The law before the enactment of the Arbitration Act.

At the inception of the argument, a general statement of the law of arbitration prior to the enactment of the Federal Arbitration Act may be of value in connection with the points subsequently raised.

The old law upon this subject is very fully considered in the opinion of this Court delivered by Mr. Justice BRANDEIS in *Red Cross Line* v. *Atlantic Fruit Company*, 264 U. S. 109.

The following principles of law were there set forth

1st: That no action will lie in equity for the specific performance of an agreement for arbitration.

2nd: That an action at law will lie for damages for breach of contract for arbitration.

3rd: An action at law will lie to recover amount of the award of arbitrators.

4th: A Court of admiralty can not order specific performance of a contract.

POINT II.

The Arbitration Act is unconstitutional because it deprives the Federal Courts of their judicial power and gives it to laymen.

The right to hear and determine the merits of a pending cause is an important part of the judicial power.

This Act takes away from the district courts power to hear and determine the merits of causes pending before them.

The Act converts them into ministerial officers to give effect to the award of a non-judicial body.

The only power given to any Court, over the award of arbitrators, is to set it aside for fraud, etc., under Sec. 10 or to correct errors in it under Section 11.

As we shall point out hereafter the effect of the decision of the Circuit Court of Appeals is that the provisions of sections 10 and 11 have no application to proceedings in admiralty and therefore in those proceedings, under the decision below, a court of admiralty can not set aside or correct the award for any reason, but can only enter a decree upon it.

Section 1 of Article 3 of the Constitution, provides as follows:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Section 2 of Article 3 of the Constitution provides that the judicial power shall extend "to all cases of admiralty and maritime jurisdiction."

It is clear, under the provisions of Section 1 of Article 3, that Congress cannot vest any judicial power under the

Constitution in any body other than a court duly created under the provisions of the Constitution.

It is well settled that there can be no delegation of the judicial power of the federal courts either by the courts themselves, or by Congress.

The question of the constitutionality of the Arbitration Act may be approached from two points of view.

In the first instance, the Act may be regarded as an attempt to delegate the judicial power of the courts, and to deprive them of that power and, in the second instance, it may be regarded as an attempt to confer judicial power upon some body other than a court.

From either point of view, the Act would seem to be unconstitutional.

The right to hear and determine is of the very essence of the judicial power. The Act as construed below completely deprives the courts of that fundamental right and provides for a complete delegation of the judicial power of the courts to arbitrators.

The question may be approached from the other point of view, that is, as an attempt to vest judicial power in some body other than the Court. Viewed from that standpoint, the Act is invalid because all judicial power, under the Constitution, must be vested in courts duly created in accordance with its provisions.

It is too clear for argument that an arbitrator is not a court within the meaning of the language of the Constitution.

As we understand the decision of the Circuit Court of Appeals, the above propositions are not controverted, but the Court attempted to show that they have no application to the provisions of the Arbitration Act.

The Circuit Court of Appeals has said that arbitration is directed merely to the remedy, and that the Act,

being a procedural statute, was within the power of Congress to enact.

There is no question but that arbitration does go to the remedy.

But the decision of the Court below goes even further and holds that under the Constitution, the inferior federal courts are purely the creatures of Congress and that the latter, having the power to regulate procedure, may deprive those courts of the power to hear and determine upon the ground that such legislation relates merely to procedure.

If this view is correct, then Congress may provide that in all jury trials, at common law, the jury shall sit alone without the presence or guidance of the judge, or that some person other than a judge may preside upon those trials.

If Congress has this broad power, as asserted by the Circuit Court of Appeals, then Congress can provide that every admiralty suit shall be referred to a commissioner to hear and determine.

If this contention is true, Congress may go even further and may provide that every admiralty suit or every equity suit brought in the Southern District of New York, shall be referred to the Grain Committee of the New York Produce Exchange, to hear and determine.

Unquestionably, Congress may regulate the procedure of the courts in some respects, but that right is not without limit. It may not, under the guise of a statute relating to procedure, deprive the courts of their judicial power.

The decision of the Court below is that the judges of the inferior federal courts derive all of their powers from Congress and that the latter may deprive them of the power to hear and determine and convert them into purely ministerial or clerical officers whose sole duty is to enter a decree, upon the determination of some other body.

This view seems to be in direct conflict with the provisions of Section 1 of Article 3 of the Constitution that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time establish.

It must be conceded that the power to hear and determine goes to the very foundation of the judicial power and taking away the power to hear and determine the judicial power becomes completely destroyed.

The Court below attempts to sustain its conclusion by referring to the decisions of this Court holding that while the Constitution provides that the federal courts shall have jurisdiction over certain classes of cases, that provision is dormant until Congress acts and the federal courts have only such jurisdiction as Congress grants.

The case of *Jackson* v. *Steamboat Magnolia,* 20 How. 296, is cited in support of that argument.

There is no question as to the law upon this subject, as it is well settled that the inferior federal courts have only such jurisdiction as Congress may grant to them.

But it by no means follows that when those courts are created by Congress, that the latter may deprive them of their judicial power and convert them into purely ministerial officers.

The decision of the Court below upon this point is that Congress has complete power and control over the inferior federal courts.

This view presupposes that those courts derive no powers whatsoever from the Constitution.

That theory is, we submit, unsound and not in accordance with the law.

It is true that the establishment of the inferior federal courts and their jurisdiction are solely within the power of Congress, but we submit that when those courts are created by Congress, they are automatically vested with the ju-

dicial power under the provisions of Section 1 of Article 3 of the Constitution, and while Congress may fail to create the inferior federal courts, when created, it cannot deprive them of the judicial power under the Constitution.

In other words, Congress, under the Constitution, has the power to create the inferior federal courts, but when so created, they have a status under the Constitution with which Congress cannot interfere.

The theory of the Court below is that the inferior federal courts derive all their jurisdiction and powers from Congress is not in accordance with the authorities upon this subject.

In *Mayor, etc. of Nashville* v. *Cooper,* 6 Wall. 247, Mr. Justice SWAYNE stated the law upon this subject as follows:

> "As regards all Courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the Court the capacity to take it and an Act of Congress must have supplied it. Their concurrence is necessary to vest it."

That statement was referred to with approval by Mr. Justice SUTHERLAND in *Kline* v. *Burke Construction Co.,* 260 U. S. 226.

The same view has been set forth in the following cases:

United States v. *Burlington & Henderson County, etc.,* 29 Fed. 331;
Harrison v. *Hadley,* 2 Dill. 229, Fed. Cases 6137;
Manley v. *Olney,* 32 Fed. 708;
Schrauger & Johnson v. *Phillips Bernard Co.,* 240 Fed. 131;
In re Hollins, 229 Fed. 349;
Farrell v. *Waterman S. S. Co.,* 291 Fed. 604.

This Court has repeatedly recognized the distinction between the *constitutional* and *legislative* courts.

A full review of the cases, showing the distinction between these two classes of courts, will be found in the opinion in *Ex Parte Bakelite Corporation*, 279 U. S. 438.

The difference in the jurisdiction of these courts, as set forth in the various opinions of this Court, shows that the constitutional courts derive their powers, when created, from the Constitution, while, on the other hand, the legislative courts are subject to complete control by Congress and derive none of their powers from the Constitution.

It is said in the opinion of the Circuit Court of Appeals, as follows:

> "The validity of a clause providing arbitration under the New York Arbitration Act was held no constitutional impediment in the Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109."

That case arose under the arbitration laws of the State of New York and does not concern the Federal Arbitration Act at all. We find nothing in the opinion sustaining the statement that this Court held that there was no constitutional impediment against an arbitration clause. That case concerned only the question whether an arbitration could be had under the New York statute in the courts of that State upon a maritime contract. The Court of Appeals of New York held that such contracts fell exclusively within admiralty jurisdiction, but this Court, reversing the Court of Appeals, held otherwise.

POINT III.

The Court below erred in holding that Congress had the power to enlarge the jurisdiction of the admiralty courts, by conferring upon them the equitable power of specific performance.

Section 4 of the Arbitration Act provides that where any party aggrieved by the failure or refusal of another to arbitrate under a written provision for arbitration that he may, amongst other things, petition a court in admiralty which would have jurisdiction of the subject matter of the controversy, for an order directing that the arbitration shall proceed in the manner provided for in such agreement and that the Court, after hearing, may grant an order to that effect.

Section 8 of the Act provides that in admiralty actions, where there has been a seizure of the vessel in rem or an attachment of the property of the respondent, that "the court shall then have jurisdiction to direct the parties to proceed with the arbitration."

The power to enforce specific performance of a contract is certainly one which is not vested in a court of admiralty, under the well established law as to its jurisdiction.

While the admiralty courts may apply equitable principles in cases falling within their jurisdiction, yet they have not the characteristic powers of a court of equity.

The Eclipse, 135 U. S. 599.

They cannot enforce specific performance of a contract.

Kynoch v. *The S. C. Ives,* New. 205; Fed. Cases No. 7958;

Red Cross Line v. *Atlantic Fruit Co.,* 264 U. S. 109.

The Court below, however, has sustained the power of an admiralty court to enforce specific performance by saying as follows (fol. 241):

> "The Act does not deprive the District Court of jurisdiction, but it seems to enlarge that jurisdiction so as to embrace the enforcement of arbitration agreements not only by ordering such arbitration to proceed, but by entering a decree upon this award."

This statement is in direct conflict with the uniform decisions of this Court that Congress cannot enlarge the jurisdiction of the courts of admiralty and that the determination of what matters fall within the jurisdiction of the court of admiralty, is a purely judicial question.

The law upon this subject is stated as follows by Mr. Justice BRADLEY in *The Lottawanna,* 21 Wall. 558:

> "The question as to the true limits of maritime law and admiralty jurisdiction is, undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no state law or Act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received, as law in the maritime usage of this country, and on such legislation as may have been competent to affect it."

A similar statement of the law was made by Mr. Justice HOLMES in *The Black Heath,* 195 U. S. 361.

It is said in the opinion of the Court below as follows:

> "A power under S. 8 to enforce specific performance in a contract is but a remedy incident to jurisdiction under the Act. (Hartford Accident v. Southern Pacific, 273 U. S. 277; Morse Dry Dock v. Northern Star, 271 U. S. 552.)"

There is nothing in the decisions of this Court in those cases supporting the contention that a court of admiralty has power to enforce specific performance as a remedy incident to its jurisdiction.

The case of *Morse Dry Dock Company* v. *Northern Star, supra,* involved only the construction of the Preferred Mortgage Act, and largely the question of relative priority of preferred mortgages and liens.

The constitutionality of the Preferred Mortgage Act was not even suggested in the case. Its constitutionality is still open to question. It is unnecessary at this time to enter into any discussion of its constitutionality, but in view of the previous decisions of this Court upon the subject, the constitutionality of some of its provisions is subject to grave doubt.

Nor is there anything to be found in the decision in the *Hartford Accident* case, *supra,* which supports this theory that specific performance is only a remedy incident to jurisdiction.

That case was one of limitation of liability. This Court held that a court of admiralty, in working out its jurisdiction, aequired the right to marshal all claims and that upon dismissing the petition, it might, at its discretion, retain jurisdiction over the whole subject matter. But we find nothing in the case which supports the theory propounded by the Court below.

Probably the latter had in mind the right to grant an injunction in limitation proceedings, restraining claimants from bringing suit elsewhere than in the court in which the limitation proceeding is pending.

But that provision does not empower an admiralty court to enforce specific performance as an incident to its jurisdiction.

This Court long ago held that a proceeding for limitation of liability is within the constitutional grant of power

to Congress to establish courts of admiralty and maritime jurisdiction.

Norwich & N. Y. Transportation Co. v. Wright, 13 Wall. 104.

As this Court held that the limited liability law was within the power of Congress to enact, the provision for an injunction was one only for the protection of the jurisdiction of the Court. In such proceedings, a monition issues against all parties to bring their claims into the limitation proceedings.

Every Court, including a court of admiralty, has inherent power to punish for contempt and the injunction issued in the limitation proceedings is merely notice to all parties that they must bring their claims within the admiralty and not elsewhere and that they shall be subject to contempt if they act otherwise.

POINT IV.

The Court below erred in holding that the provisions of Section 8 of the Act are independent of the other sections of the Act, instead of construing the Act as a whole, and, it especially erred because Section 8 of the Act has no application to this case.

It was contended by the petitioner in the Court below that as the contract in this case was for intrastate carriage, only, the Act had no application, under the provisions of Section 1.

The Court held otherwise, however, and said as follows (p. 245):

> "But Section 8 provides, as the basis of jurisdiction, an admiralty cause of action, including libel,

> and seizure, and it declares such basis of jurisdiction to be independent of the provisions of the Act 'notwithstanding anything herein to the contrary.' "

It is also said in the opinion of that Sections 4 and 8 make no reference to Section 1.

The petitioner also contended that no decree could be entered under Section 9 of the Act, which provides that a decree can be entered upon the award only where the parties have so stipulated in their agreement.

This effect of the provisions was of Section 9 was fully argued in the Court below, both in the brief and orally, but it is not referred to in the decision. Presumably the Court ignored that argument upon the same ground, namely, that the proceedings in this case in admiralty were governed solely by the provisions of Section 8 and that the provisions of no other section apply, except possibly those of Section 4.

The construction which the Court below placed upon the provisions of Section 8 is, we submit, contrary to the well established principles of statutory construction.

It is a cardinal principle that a statute shall be construed as a whole and that its various sections shall be harmonized if possible.

This point was raised in *Zip Manufacturing Co.* v. *Pep Mfg. Co.*, 44 Fed. (2nd) 184, decided by NIELDS, District Judge of the District of Delaware. That was a patent case and a motion was made for arbitration, which was denied. It was held that all sections of the Act should be considered together and harmonized, if possible, and that no arbitration could be ordered, except in cases falling within Sections 1 and 2 of the Act.

But Section 8 itself cannot be properly construed as has been done by the Court below, namely that it declares that the basis of jurisdiction shall be independent of the

other provisions of the Act "notwithstanding anything herein to the contrary."

The purpose of Section 8 is clear enough and shows that it does not create a system of procedure in the admiralty, independent of all the other sections of the Act. Section 8 was intended to give to a litigant in an admiralty court, having jurisdiction, the right to those remedies which are peculiar to the admiralty, namely, the seizure of the vessel in an action in *rem*, or the attachment of the property of the respondent, where such an attachment would properly lie.

Section 8 does not declare, as the Court below held that it is independent of the other provisions of the Act but it only declares that the libellant shall have the right of seizure and action in *rem* or attachment of the property of the respondent, and no more, and the words "notwithstanding anything herein to the contrary" mean no more than that the right to admiralty process shall remain, notwithstanding any provision in the Act supposedly to the contrary.

But the Court below overlooked the fact that Section 8 has no application to this case whatsoever.

It would be assumed from reading the opinion of the Court below that the tug *Fagan* was a party to the arbitration proceedings and that a decree had been entered against it and its stipulator, but the facts are directly to the contrary, as the Court ordered arbitration only as against the Marine Transit Corporation, in the suit in *personam*.

Section 8 has no application whatsoever to proceed in *personam* in the admiralty. Its provisions are quite clear and are susceptible of no other construction than that they relate only to proceedings in *rem* or proceedings in *personam* where there has been an attachment of the property of the respondent.

There was no attachment of the property of the Marine Transit Corporation, under the libel against it in *personam*, and the provisions of Section 8 had no application to the proceeding against it in *personam*.

As the provisions of Section 8 have application only in proceedings *in rem* and to cases where there is an attachment of the property of the respondent, the District Court had no power under that section to make an order for arbitration of the proceeding against the Marine Transit Corporation, in *personam*.

Under the provisions of Section 4 of the Act, the party aggrieved by the alleged failure or neglect to arbitrate in a written agreement, may petition any court of the United States, which save for such agreement would have jurisdiction under the judicial code at law, in equity or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration shall proceed and the Court, after hearing, may so direct.

Except, therefore, as provided in Section 8, the Act nowhere provides for the granting of an order of arbitration in a pending suit.

Consequently, as the action in *personam* against the Marine Transit Corporation was not covered by the provisions of Section 8, the Court was without power to grant the arbitration in the suit and the libellants' only method of obtaining arbitration, under the terms of the Act, was by an independent proceeding by petition under the provisions of Section 4.

POINT V.

The decision of the Circuit Court of Appeals is in direct conflict with the terms of the Arbitration Act, which provides in Section 9 that a judgment may be entered upon the award of arbitrators only, if the parties have so agreed by their contract for the arbitration.

Section 9 of the Arbitration Act provides that judgment may be entered upon the award of the arbitrators only "if the parties in their agreement have agreed that a judgment of the Court shall be entered upon the award."

There was no agreement of that kind in this case, as the contract provided for no more than the arbitration of disputes under the contract (fol. 596).

This question was fully argued in the Circuit Court of Appeals, both orally and in the brief, but notwithstanding its importance in the case, it is not even referred to in the opinion.

It is to be assumed, therefore, that the point is ignored in the opinion because of the conclusion of the Court referred to in the previous point, namely, that as the provisions of Section 8 of the Act create a complete system for the application of the Act in admiralty proceedings, it therefore is to be read independently of all of the other sections of the Act, and consequently that the provisions of Section 9 did not apply to admiralty proceedings.

As that point has already been fully considered, it is unnecessary to elaborate upon it here.

We may point out, however, that if this proposition of the complete independence of Section 8 of the Act is sound, then an anomalous condition results.

If the libellants had brought suit at law against the Marine Transit Company upon the contract involved in

this case, no judgment could have been entered upon the award under the provisions of Section 9 because the parties did not stipulate that judgment should be entered upon the award of the arbitrators.

According to this theory of the Court below, the libellants are entitled to have a decree entered herein in an action in admiralty when one could not have been entered in an action at law.

Certainly neither Congress nor the framers of the Act contemplated a result of that kind.

POINT VI.

The decision of the Court below that an admiralty court has jurisdiction to enforce an arbitration of a contract for intrastate carriage is erroneous because under Section 1 of the Act, the courts have jurisdiction only over maritime transactions and contracts involving either interstate or foreign commerce.

The contract here was for intrastate carriage only.

This point raises the same question which is involved in some of the other points, namely, whether the provisions of Section 8 are entirely independent of the provisions of all other sections of the Act, because not specifically referred to in it, or whether its provisions must be read in connection with the other sections.

The following statement is made in the opinion of the Circuit Court of Appeals:

> "The parties claiming to be aggrieved at bar were the appellees as they applied under S. 8 of the arbitration act because of the appellant's failure, neglect or refusal * * * to arbitrate under a written agreement for arbitration (S. 4) and nothing in either section 4 or 8 confines such written agreements for arbitration to agreements involving maritime transactions in a limited sense."

This decision of the Court is contrary to the decision of NIELDS, *D. J.* (District of Delaware), in *Zip Mfg. Co.* v. *Pep Mfg. Co.*, 44 Fed. (2d) 184, to which reference has been made already.

It was there held by the Court that all sections of the Act were to be construed together and harmonized if possible and that no arbitration could be ordered except in cases falling within the terms of Sections 1 and 2 of the Act.

Section 1 of the Act defines maritime transactions as "charter parties, etc." or any other matters in foreign commerce, which if the subject of controversy, would be embraced within admiralty jurisdiction. In that section, commerce is defined as meaning interstate or foreign commerce. Neither of these sections apply to purely intrastate transactions or commerce.

Although the Court below has found that the provisions of Section 1 have no bearing whatsoever in admiralty actions under Section 8, the opinion further proceeds to consider the question whether or not this contract fell within the provisions of Section 1.

It is said in the opinion of the Circuit Court of Appeals, as follows:

> "But it is said that the grain was not established to be for foreign shipment."

We have made no such contention. What we did argue was that the contract made between these parties was for intrastate carriage and that under the provisions of Section 1, the question was as to the character of the contract and not the nature of the shipment.

The facts of the case are very simple and may be briefly restated.

The grain which was lost was carried from Fort William, Ontario, to Buffalo by lake steamer, which arrived at Buffalo about July 24th, 1928. There is no evidence of any through bill of lading in the case.

The steamer carrying the cargo to Buffalo issued a local lake bill of lading.

The grain was stored in the American elevator at Buffalo on July 28, 1928 (p. 164), and nearly three weeks later, on August 17, 1928, Dreyfus & Co. and the Marine Transit Corporation entered into a contract for the carriage of 200,000 bushels of wheat from Buffalo to New York.

The contract made was for purely intrastate carriage from Buffalo to New York (p. 147), and a bill of lading was issued by the Marine Transit Corporation for the carriage of the cargo which was lost, to New York (p. 163).

It may well be that for certain purposes, that this shipment so far as concerned Dreyfus & Company, was a foreign one, but that fact has no bearing upon the right to arbitration under the provisions of the Act because it confers power to enforce arbitration only where the contract made between the parties relates to foreign or interstate commerce.

The nature of the shipment has no connection whatsoever with the right to arbitration under the Act.

It is also said in the opinion that the Barge Canal was a waterway for foreign commerce. There is no question about that fact, but it has no bearing whatsoever upon the right to arbitration under the Act. That concerns only the admiralty jurisdiction.

POINT VII.

The Court below erred in holding that execution should issue against the stipulator for the tug, although no decree was entered against the tug, is clearly erroneous and is in conflict with the uniform law upon the subject.

The statements in the opinion of the Circuit Court of Appeals as to the proceedings are misleading. It might be inferred from those statements that the tug *Fagan* was a party to the arbitration proceedings, which was not a fact.

The opinion also fails to make clear that the Marine Transit Corporation appealed in two different capacities, first, from the decree against it in *personam,* and second, as claimant of the tug *Fagan.* The latter appeal related to the decree of the District Court that execution should issue against the stipulators for the tug.

The tug *Fagan* was sued in *rem.* A stipulation for its value in the sum of $26,000.

Libellant made a motion to refer the issues as to the Marine Transit Corporation, in *personam,* and the tug *Fagan* in *rem,* to arbitration. The Court granted the motion only as to the Transit Corporation, in *personam,* and denied it as to the tug. The arbitration, therefore, proceeded against the Marine Transit Corporation in *personam* only. The arbitration was had as to it only. The award was against it only. The Court, in confirming the award, entered a decree against it only.

But, nevertheless, the Court, by its decree, directed that execution should issue against the stipulator for value of the tug, although the tug was not a party to the arbitration proceeding, nor was there any decree against it.

This portion of decree violates not only the uniform practice of the admiralty, but all of the well-established

principles of law. Nothing is better settled than that a stipulator or surety is liable only for the default of its principal.

In this case, the principal of the stipulator was the tug *Fagan* and its liability has never been adjudged in any way whatsoever, nor has any decree been entered against it.

The Court says in the opinion that the libel and seizure was a proceeding in *rem*, which it undoubtedly was, but that does not alter the situation as the action in *rem* was never tried.

It is said in the opinion of the Circuit Court of Appeals that the stipulation given for the release of the tug was a substitute for the vessel which made the stipulation liable to the exercise of every authority in the power of the Court which it could exercise if the *res* was still in the Court's custody.

There is no question about this principle of law, but it has not the slightest application to the facts of this case. If no stipulation had been given for the release of the tug and it had remained in the custody of the Court, the latter would have been powerless to enter any decree against it without hearing and determination of its liability.

The law and practice upon this subject are too well established to require much discussion.

In actions in *rem*, the final decree runs against the vessel with provision for execution against the stipulator for its release. (See form Benedict's Admiralty, Vol. 2, pp. 490-491.)

No decree can be entered against the claimant of a vessel, personally, but if he has signed the stipulation, he is, of course, liable upon it.

Atlantic Mut. Ins. Co. v. *Alexandre*, 16 Fed. 379.

It so happens in this case that the Marine Transit Corporation, which was sued in *personam*, was also the owner

of the tug *Fagan* and made claim for it. But that does not alter the situation. It had two distinct identities in the case.

The stipulator cannot be bound except by the terms of his stipulation, and by the stipulation it did not agree to pay upon default of the Marine Transit Corporation. It agreed to pay only in the event of a final decree against the tug *Fagan* and there has been none.

The opinion of the Circuit Court of Appeals indicates a misapprehension of the facts of the case, and if there was any such misapprehension, it was removed at the conference with MANTON, *J.* But as shown by his letter of May 20, 1931, to counsel, the error still remains.

There was one statement in the opinion apparently relating to this point to which attention is called because it shows an erroneous impression as to arbitration under the Act.

It is said in the opinion as follows (Rec., p. 244):

> "Section 8 of the Arbitration Act contemplated that the liability arbitrated between the parties was a liability that attached to the tug as well as to the owner in personam."

In other words, this is a decision that notwithstanding the District Court declined to submit the issue as to the tug's liability to arbitration because it was not a party to the contract, nevertheless the tug was a party to the arbitration proceedings.

The fallacy of this decision is so obvious that it requires no consideration.

It is true that Section 8 of the Arbitration Act covers arbitration where there is a proceeding in *rem* against a vessel.

But the construction of that section by the Circuit Court of Appeals apparently is that the courts have power

to order arbitration in any case in *rem* in admiralty whether any agreement for arbitration exists or not.

Clearly the Act cannot be given any such construction.

Owing to the fact that there are different underwriters involved in this case, the decree providing that execution should issue against the stipulator of the tug, has created a situation of confusion. This confusion should be removed by the application of the proper principles of law, and it is submitted that as this error has not been corrected below, that it should be corrected by this Court.

POINT VIII.

The Court erred in holding that it was not necessary that the award should be signed by all the arbitrators.

The arbitration was had before five members of the Grain Committee, including Mr. Walter Trapp (p. 30). Mr. Trapp did not sign the award (p. 166).

The Act contains no provision upon this subject although the Arbitration Act of the State of New York, which we understand was largely followed in the preparation of the Federal Act, does contain a provision that a majority of the arbitrators may make an award.

With this provision of the New York statute before them, the framers of this Act inserted no similar provision and it is a fair presumption, therefore, that they intended that the award of the arbitrators should be unanimous.

It is said in the opinion of the Court below, that it is not necessary that the award should be unanimous and that "a committee of four out of five signed the award" (Rec., p. 242).

Aside from any inference that it was the purpose of Congress to require unanimity of award, we submit that in

the absence of any provision on the subject, unanimity is necessary.

A board of arbitrators is very similar to a jury and in the absence of any provision on the subject in the Arbitration Act, it is to be fairly assumed that Congress intended that the award of arbitrators, like the verdict of a jury, should be unanimous.

This question is not judicial, but legislative.

As Congress did not provide that the award need not be signed by all the arbitrators, the courts can not declare otherwise.

LASTLY.

It is respectfully submitted that the decree below should be reversed.

HORACE L. CHEYNEY,
Counsel for Petitioner.

APPENDIX.

THE UNITED STATES ARBITRATION ACT

Act of Congress, February 12, 1925, C. 213, Sec. 41, Title 9, U. S. Code of Law.

An Act to make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED:

Section 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title.

"Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Sec. 2 Validity, irrevocability and enforcement of agreements to arbitrate.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Sec. 3. Stay of proceedings where issue therein is referable to arbitration.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Sec. 4. Failure, etc., to arbitrate under agreement, petition to United States Court having jurisdiction to compel arbitration; notice and service thereof; hearing and determination.

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States

which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for the service of summons in the jurisdiction in which the proceeding is brought. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. PROVIDED, That the hearing and proceedings under such agreement shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceed-

ing thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Sec. 5. Appointment of arbitrators or umpire.

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avoid himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

Sec. 6. Application heard on motion.

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

Sec. 7. Witnesses before arbitrators; fees; compelling attendance.

The arbitrators selected either as prescribed in this Act or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such atten-

dance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States court and for the district in which such arbitrators, or a majority of them, are sitting, may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner now provided for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

Sec. 8. Proceedings began by libel in admiralty and seizure of vessel or property.

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, not withstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

Sec. 9. Award of arbitration; confirmation; jurisdiction; procedure.

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the

court, then at any time within one year after the award is made any part to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in the next two sections. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a non-resident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the Court.

Sec. 10. Same; vacation; grounds; rehearing.

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause show, or in refusing to hear evidence pertinent and ma-

terial to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the times within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Sec. 11. Same; modification or correction; grounds; order.

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration:

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

Sec. 12. Notice of motions to vacate or modify; service; stay of proceedings.

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a non-resident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

Sec. 13. Papers filed with order on motion; judgment; docketing; force and effect; enforcement.

The party moving for an order confirming, modifying or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk;

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to conform, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

Sec. 14. Citation of title.

This Act may be referred to as "The United States Arbitration Act."

Sec. 15. Contracts not affected.

All Acts and parts of Acts inconsistent with this Act are hereby repealed, and this Act shall take effect on and after the 1st day of January next after its enactment, but shall not apply to contracts made prior to the taking effect of this Act.

FILE COPY

JUL 2 1931

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 172.

MARINE TRANSIT CORPORATION and Tug "GERALD A. FAGAN" by MARINE TRANSIT CORPORATION, Claimant,

Petitioner,

against

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, Co-partners, doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION.

OTTO & LYON,
Proctors for Respondents,
by GEORGE V. A. MCCLOSKEY,
Counsel.

INDEX.

	PAGE
Statement	1
Point I—The Arbitration Act is constitutional	4
Point II—The Act should be construed with a view to effectuating its purposes	14
Point III—Section 8 of the Act, referring to causes of action otherwise justiciable in admiralty, is independent of Section 9 referring to agreements for arbitration on which an award has been made and which authorize entry of judgment thereon	16
Point IV—The action is *in rem* within Section 8	19
Point V—Objection to the award as not unanimous is not well taken	21
Point VI—The shipment was in fact an international shipment and in any event the Act is applicable in this litigation	22
Point VII—Decree was properly entered against the petitioner and the stipulator for value of its tug	27
Point VIII—The petition and supporting brief do not conform to the requirements of the rules of this court prescribing that such petition shall contain only a summary and short statement of the matter involved and the reasons relied on for the allowance of the writ and that the supporting brief must be direct and concise	32

List of Cases Cited.

	PAGE
Atlantic Fruit Co. vs. Red Cross Line, 5 F. (2d) 218	6
B. & O. R. Co. vs. Settle, 260 U. S. 166	23
Beaconsfield, The, 158 U. S. 303	28
Belgenland, The, 108 U. S. 153	29
Berkovitz, Matter of, vs. Arbib & Houlberg, Inc., 230 N. Y. 261	7
Bogart vs. Steamboat John Jay, 17 How. (58 U. S.) 399	13
Bronx, The, 246 Fed. 809	11
California-Atlantic S. S. Co. vs. Central Door & Lumber Co., 206 Fed. 5	19
Dampskibs Aktieselskabet Thor vs. Tropical Fruit Co., 281 Fed. 740	19
Gansfjord, The, 25 F. (2d) 736, affirmed 32 F. (2d) 236	5
Glide, The, 72 Fed. 200	28
Harriman vs. The Rockaway Beach Pier Co., 8 Fed. 94	31
Hartford Accident & Indemnity Co. vs. Southern Pacific Co., 273 U. S. 207	14
Jackson vs. Steamboat Magnolia, 20 How. (61 U. S.) 296	4
Kline vs. Burke Construction Co., 260 U. S. 226	5
Lane vs. Townsend, 1 Ware 286, Fed. Cas. No. 8054	28
Luckenbach vs. Delaware, Lackawanna & Western R. Co., 168 Fed. 560	11

PAGE

Marchant vs. Mead-Morrison Mfg. Co., 29 F. (2d) 40, certiorari denied 278 U. S. 655 11
Merritt & Chapman Derrick & Wrecking Co. vs. Chubb, 113 Fed. 173 19

New York, The, 104 Fed. 561 28
Northern Star, The, 271 U. S. 552 13
No. 6, The, 241 Fed. 69 13

Palmyra, The, 12 Wheat. (25 U. S.) 1 27
Perriam vs. Pacific Coast Co., 133 Fed. 140 29
Providence & New York S. S. Co. vs. Hill Mfg. Co., 109 U. S. 578 14

Rainey vs. New York & P. S. S. Co., Ltd., 216 Fed. 449 19
Red Cross Line vs. Atlantic Fruit Co., 264 U. S. 109 ..... 9, 11

Southern Pacific Co. vs. Jensen, 244 U. S. 205 .. 12
Steamer St. Lawrence, The, 1 Black (66 U. S.) 522 20
Susquehanna, The, 267 Fed. 811 21

Wanata, The, 95 U. S. 600 ..... 27, 29
Wenger & Co., Inc., Matter of S. A., vs. Propper Silk Hosiery Mills, Inc., 239 N. Y. 199 21

Virgin, The, 8 Pet. (33 U. S.) 537 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

MARINE TRANSIT CORPORATION, and Tug "GERALD A. FAGAN" by MARINE TRANSIT CORPORATION, Claimant,
Petitioner,
against
LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, Co-partners, doing business under the firm name and style of LOUIS DREYFUS & COMPANY,
Respondents.

No. 172.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The Circuit Court of Appeals for the Second Circuit affirmed a final decretal order in admiralty entered upon an award of arbitrators in favor of the respondents (libellants) in a proceeding under Section 8 of the United States Arbitration Act. The respondents, cargo owners, filed their libel for loss of cargo in the Southern District of New York *in rem* against the tug Gerald A. Fagan and the barge John E. Enright—against which latter proceedings were abandoned—and *in personam* against the Marine Transit Corporation, which not only

appeared *in personam* but as claimant, giving a stipulation for value (R. 25 A, B) to release the tug. We do not understand the statement appearing in petitioner's brief (p. 23): "It would be inferred by anyone reading the opinion of the Circuit Court of Appeals that some action *in rem* was involved in its decision. Such was not the case." Such was the case upon the face of the record.

Section 8 of the Act is consistently ignored in the petitioner's brief but all the proceedings herein were taken under authority thereof. The Section reads as follows:

> "That if the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the Court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award."

The controversy, as stated in the opinion of the Circuit Court of Appeals (R. 239, 240) arose under a contract whereby the petitioner agreed to furnish the respondents as charterers insurable canal tonnage for about 200,000 bushels of wheat on the Buffalo to New York part of an international carriage from Fort William, Ontario, for export. The booking contract (R. 147, 148) incorporated by reference the terms of the New York Produce Exchange Canal Grain Charter Party No. 1 as amended (R. 149-156), including an arbitration clause requiring disputes thereunder to be arbitrated before the Committee on Grain of the New York Produce

Exchange (R. 156). The grain was "in bond for export" (R. bottom p. 164) as appears from the Marine Transit Corporation's bill of lading covering 19,200 bushels which were laden upon the barge Edward A. Ryan and for the loss of which the libel was filed, as on entering the Government lock at Troy, while in tow of the petitioner's tug Gerald A. Fagan, the barge Edward A. Ryan came in contact with the guard wall and sank. All the maneuvering had to be done by the tug: the barge John E. Enright, which was also in tow, was not steering (R. 91) so that she was obviously not liable.

The District Court ordered the Marine Transit Corporation to submit to arbitration any and all issues under the contract (R. 28, 29). The merits were accordingly presented to the Committee on Grain who took extended testimony (R. 30-128), heard petitioner's counsel (R. 129-137) as well as respondents' (R. 138-146) and made an award that the Marine Transit Corporation pay Louis Dreyfus & Company $23,016., plus interest amounting to $1,168.66, and in addition bear the costs and expenses of the arbitration in the sum of $362.50 (R. 166). Such award was confirmed by the District Court (R. 214, 215). Confirmation was opposed on grounds not urged upon appeal to the Circuit Court of Appeals or in this Court and the grounds now urged were not then presented.

Thereafter the petitioner procured an order requiring the respondents to show cause why they should not be restrained from recovering (as provided in the decretal order confirming the award) from "the claimant or its stipulators on behalf of the tug Gerald A. Fagan" but such order was vacated by Judge Caffey (R. 225, 226) with an opinion (R. 223, 224).

When the arbitration was ordered, all further proceedings against the barge John E. Enright were abandoned and, although a formal discontinuance as against the John E. Enright was omitted in the decretal order

confirming the award, such formal discontinuance was thereafter entered (R. 235, 236).

The Marine Transit Corporation, "claimant and respondent" (R. 227), appealed to the Circuit Court of Appeals for the Second Circuit and filed assignments of error (R. 229-232) and additional assignments of error (R. 233, 234) which did not assign as error Point III and Point V of its brief in support of the petition.

POINT I.

The Arbitration Act is constitutional.

The constitutionality of the Act is assailed in petitioner's Points I and II. No case questioning the constitutionality of the Act is known to us or cited by opposing counsel. Their whole argument is pervaded by the notion that the judicial power of the nation is communicated to the existing Federal courts by the Constitution of the United States. On the contrary, only the original jurisdiction of the Supreme Court is prescribed by the Constitution and even that court is of statutory organization. The inferior Federal courts have only a statutory jurisdiction and Congress may distribute to them as much or as little of the judicial power of the United States as Congress may see fit. The United States District Courts have no right to any jurisdiction which Congress has withheld and such jurisdiction as it grants must be exercised in accordance with the procedural requirements of Congressional enactment.

As this Court said in *Jackson* vs. *Steamboat Magnolia*, 20 How. (61 U. S.) 296 at p. 300:

> "The Constitution, in defining the powers of the courts of the United States, extends them to 'all

cases of admiralty and maritime jurisdiction'. It defines how much of the judicial power shall be exercised by the Supreme Court only; and it was left to Congress to ordain and establish other courts, and to fix the boundary and extent of their respective jurisdictions. Congress might give any of these courts the whole or so much of the admiralty jurisdiction as it saw fit. It might extend their jurisdiction over all navigable waters, and all ships and vessels thereon, or over some navigable waters, and vessels of a certain description only."

In *Kline* vs. *Burke Construction Co.*, 260 U. S. 226, 233, 234, this Court, referring to the provisions of the Constitution respecting the judicial power, said:

"The effect of these provisions is not to vest jurisdiction in the inferior courts over the designated cases and controversies but to delimit those in respect of which Congress may confer jurisdiction upon such courts as it creates. Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution."

In *The Gansfjord*, 25 F. (2d) 736, 737—affirmed 32 F. (2d) 236, 5th C. C. A.—Burns, D. J., said:

"Certainly Congress may distribute the judicial power as its wisdom, in the light of experience, dictates, under its broad powers to regulate commerce, etc., and to ordain and establish courts inferior to the Supreme Court. If this be so, there

can be no question of its right to prescribe mere procedural forms for the enforcement of remedial legislation in the public interest."

The Arbitration Act is a procedural statute and as such entirely within the competency of Congress which has power (Constitution of the United States of America, Article I, Section 8, clause 9) "to constitute tribunals inferior to the Supreme Court" *i. e.*, "such inferior courts as the Congress may from time to time ordain and establish" (Article III, Section 1) and which has power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof" (Article I, Section 8, clause 18), thereby referring to the power to establish such courts as well as to the power over interstate and foreign commerce (Article I, Section 8, clause 3) and the admiralty and maritime jurisdiction comprised in the judicial power of the nation (Article III, Section 2, clause 1). That the Arbitration Act is in effectuation of the powers so committed to Congress and conducive to the purposes for which its powers were so committed, is too plain for any argument to make it plainer and the policy expressed in the Act has received so universal an approval that it would be strange to find an opposite policy embodied and embedded in the Constitution which was adopted with a view to the distribution of constitutional power between the states and the nation and without any forecast of the argument now presented by the appellant.

In *Atlantic Fruit Co.* vs. *Red Cross Line*, 5 F. (2d) 218, 2nd C. C. A., considering the question whether the New York statute on the subject affected recourse to admiralty and suggesting that the situation there de-

picted was "one that calls for remedial action", the Court said, at bottom p. 219:

> "* * * It is entirely plain that this matter of arbitration, whether based on a New York statute or resting upon traditional and judge-made law, is wholly matter of remedy."

So in *Matter of Berkovitz* vs. *Arbib & Houlberg,* 230 N. Y. 261, the New York Court of Appeals by Cardozo, J., upholding the New York statute but applying it prospectively only, said (pp. 270, 271):

> "The common-law limitation upon the enforcement of promises to arbitrate is part of the law of remedies * * * Arbitration is a form of procedure whereby differences may be settled * * * * * * A promise that differences will be arbitrated is not illegal and a nullity without reference to the law in force when differences arise. Since it is directed solely to the remedy, its validity is to be measured by the public policy prevailing when a remedy is sought. In that respect, it is not different from a promise that future controversies shall be submitted to a court. The jurisdiction of the court at the time of the submission will determine whether the promise is to be rejected or enforced. This is so whether jurisdiction in the interval has been diminished or enlarged."

In the *Berkovitz* case, *supra,* the Court of Appeals considered the validity of the New York statute in its constitutional aspects and its argument is largely applicable here. The Court of Appeals held that the statute was not inconsistent with the constitutional right of trial by jury for that right is one that can be waived and was waived by the consent to arbitrate. The Court

of Appeals rejected the argument that the statute abridged the general jurisdiction of the Supreme Court as continued "unimpaired" by the state constitution. The court held that in establishing a Supreme Court to administer the law, the People did not petrify the law which the court was to administer and that the Supreme Court did not lose a power inherent in its very being when it lost power to give aid in the repudiation of a contract, concluded without fraud or error, whereby differences are to be settled without resort to litigation. "For the right to nullify is substituted the duty to enforce." Jurisdiction, the Court of Appeals regarded, not as renounced but as adapted in the time and manner of its exercise to the convention of the parties. The Court of Appeals concluded (p. 276):

> "We think there is no departure from constitutional restrictions in this legislative declaration of the public policy of the state. The ancient rule, with its exceptions and refinements, was criticized by many judges as anomalous and unjust. * * * It was followed with frequent protest, in deference to early precedents. Its hold even upon the common law was hesitating and feeble. We are now asked to declare it so imbedded in the very foundations of our jurisprudence and the structure of our courts that nothing less than an amendment of the Constitution is competent to change it. We will not go so far. The judges might have changed the rule themselves if they had abandoned some early precedents, as at times they seemed inclined to do. They might have whittled it down to nothing, as was done indeed in England, by distinctions between promises that are collateral and those that are conditions * * *. No one would have suspected that in so doing they were undermining a juris-

diction which the Constitution had charged them with a duty to preserve. Not different is the effect of like changes when wrought by legislation."

Even before the Act of Congress, in holding the New York Arbitration Law applicable without constitutional impediment to a charter party embracing an arbitration clause, this Court in *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, thus stated its view of arbitration agreements in terms that anticipate the petitioner's arguments and render further consideration by this Court needless (pp. 120-123):

"The Federal courts—like those of the states and of England—have, both in equity and at law, denied, in large measure, the aid of their processes to those seeking to enforce executory agreements to arbitrate disputes. They have declined to compel specific performance (*Tobey* v. *Bristol County*, 3 Story, 800, 819-826, Fed. Cas. No. 14,065); or to stay proceedings on the original cause of action (Story, Eq. Jr. §670). They have not given effect to the executory agreement as a plea in bar, except in those cases where the agreement, leaving the general question of liability to judicial decision, confines the arbitration to determining the amount payable, or to furnishing essential evidence of specific facts, and makes it a condition precedent to the cause of action. *Hamilton* v. *Liverpool & L. & G. Ins. Co.*, 136 U. S. 242, 255, 34 L. ed. 419, 423, 10 Sup. Ct. Rep. 945; *Martinsburg & P. R. Co.* v. *March*, 114 U. S. 549, 29 L. ed. 255, 5 Sup. Ct. Rep. 1035. But an agreement for arbitration is valid, even if it provides for the determination of liability. If executory, a breach will support an action for damages. *Hamilton* v. *Home Ins. Co.*, 137 U. S. 370, 385, 386, 34 L. ed. 708, 713, 11 Sup. Ct.

Rep. 133. If executed—that is, if the award has been made—effect will be given to the award in any appropriate proceeding at law or in equity. *Karthaus* v. *Yllas Y. Ferrer*, 1 Pet. 222, 7 L. ed. 121; *Burchell* v. *Marsh*, 17 How. 344, 15 L. ed. 96; *Bayne* v. *Morris*, 1 Wall. 97, 17 L. ed. 495. And, although there is no Federal legislation on the subject, an executory agreement, however comprehensive, will, if made a rule of court, be enforced in courts of the United States by any appropriate process. *Hecker* v. *Fowler*, 2 Wall. 123, 17 L. ed. 759.

In admiralty, also, agreements to submit controversies to arbitration are valid. Reference of maritime controversies to arbitration has long been common practice. *Houseman* v. *The North Carolina*, 15 Pet. 40, 45, 10 L. ed. 653, 655. The insertion in a charter party of a provision for such settlement of disputes arising thereunder was practised, at least as early as the eighteenth century. *Thompson* v. *Charnock*, 8 T. R. 139, 101 Eng. Reprint, 1310. For breach of an executory agreement a libel for damages will lie. An executory agreement may be made a rule of court. *United States* v. *Farragut*, 22 Wall. 406, 419, 22 L. ed. 879, 883; *Kleine* v. *Catara*, 2 Gall. 61, Fed. Cas. No. 7,869. An award will be given full effect. The agreement, whether executory or executed, cannot be enforced in admiralty by specific performance; merely because that court lacks the power to grant equitable relief. *The Eclipse (Rea* v. *The Eclipse)*, 135 U. S. 599, 608, 34 L. ed. 269, 272, 10 Sup. Ct. Rep. 873. The executory agreement (perhaps in deference to the rule prevailing at law and in equity) will not be given effect as a bar to a libel on the original cause of action. The reluctance of the admiralty court to lend full aid goes, however, merely to the remedy. The substantive right created by an agree-

ment to submit disputes to arbitration is recognized as a perfect obligation." (Foot-notes omitted.)

The Act, so far from depriving the district courts of jurisdiction—for all their jurisdiction, as we have seen, is purely statutory, not by constitutional grant—has enlarged their jurisdiction to embrace the enforcement of arbitration agreements, not only by ordering such arbitration to proceed but by entering decree upon the award. The award of arbitrators has been given effect, without aid of statute, where the parties voluntarily proceeded with the arbitration. In requiring an unwilling party, by force of the statute, to proceed with the arbitration, the court gives essentially the same effect to the award when rendered. If an arbitrator, though chosen by the parties prior to controversy, is a constitutional stumbling-block, we wonder how special commissioners in admiralty have been so much in use since the organization of the Government under the Constitution. The petitioner's argument is as applicable to the one as to the other. Even the merits of a cause may by consent of parties, though not otherwise, be referred to a commissioner (*The Bronx*, 246 Fed. 809, 2nd C. C. A.; *Luckenbach* vs. *Delaware, Lackawanna & Western R. Co.*, 168 Fed. 560) and it is precisely such consent that supports a reference to arbitrators.

As it has been held that "the reluctance of the admiralty court to lend full aid goes, however, merely to the remedy" and that "the substantive right created by an agreement to submit disputes to arbitration is recognized as a perfect obligation" (*Red Cross Line* vs. *Atlantic Fruit Co.*, 264 U. S. 109, 123), it is not reasonable to find the Arbitration Act unconstitutional for supplying the remedy appropriate to the recognized substantive right. In *Marchant* vs. *Mead-Morrison Mfg. Co.*, 29 F. (2d) 40, (2nd C. C. A.), certiorari denied 278 U. S. 655, in directing the District Court to remand

compulsory arbitration proceedings under the New York statute to the state courts, the Court said:

> "The proceeding from the outset had all the elements of a judicial controversy, to wit, adversary parties and an issue, in which the claim of one of the parties against the other, capable of pecuniary estimation, was stated and answered in the same form of pleading. All this was addressed to the Supreme Court of the state, functioning as a judicial tribunal. *Gaines* v. *Fuentes*, 92 U. S. 10, 23 L. ed. 524. The appointment of the arbitrator was but a step in the relief sought by the plaintiff from the damages inflicted by the breach of the contract."

By parity of reasoning, under the United States Arbitration Act, the appointment of arbitrators is but a step in a proceeding presenting all the elements of a judicial controversy and this is more obviously true under Section 8 of the Act, pursuant to which the proceeding is commenced by libel and seizure "according to the usual course of admiralty proceedings."

As Judge Cardozo suggested in the *Berkovitz* case, *supra*, that in establishing a Supreme Court, the People of the State did not petrify the law, which the court was to administer, so, in conferring admiralty and maritime jurisdiction upon the United States Government the Constitution of the United States did not petrify the maritime law. As this Court said in *Southern Pacific Co.* vs. *Jensen*, 244 U. S. 205, 215:

> "Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country."

It is in the exercise of that power that Congress enacted the Limited Liability Act which gave to the courts the power, certainly of a maritime nature if not previously exercised in the American admiralty, to entertain proceedings for the limitation of the liability of ship owners. Such a proceeding is an independent head of jurisdiction without regard to whether the claims limited against are such as might have been sued upon in the admiralty or not.

The No. 6, 241 Fed. 69, 71 (2nd C. C. A.).

It was in the exercise of that paramount power that Congress enacted the Ship Mortgage Act, 1920 (Act of June 5, 1920, c. 250, 41 Stat. at L. 988), the validity of which was at least assumed in *The Northern Star*, 271 U. S. 552, as it had been assumed in advance in *Bogart* vs. *The Steamboat John Jay*, 17 How. (58 U. S.) 399, at p. 402, where this Court, after adverting to the English Act giving the admiralty courts an enlarged cognizance of mortgages of ships, said:

> "Until that shall be done in the United States, by Congress, the rule, in this particular, must continue in the admiralty courts of the United States, as it has been."

Now, we do not contend that Congress may enlarge the maritime jurisdiction to embrace subjects without maritime relation but certainly, where such relation exists, Congress may create a statutory jurisdiction not previously in use and in doing so may authorize appropriate remedies, though otherwise unknown to admiralty practice. So in a limitation of liability proceeding, under the Acts of Congress, the admiralty court "in working out its jurisdiction acquires the right to marshal all claims, whether of strictly admiralty origin or not" and further has power "to do what is

exceptional in a court of admiralty—to grant an injunction and by such injunction bring litigants, who do not have claims which are strictly admiralty claims, into the admiralty court" (*Hartford Accident & Indemnity Co.* vs. *Southern Pacific Co.*, 273 U. S. 207, 217, 218).

So, in cases arising under the eighth section of the United States Arbitration Act, the power to enforce specific performance of the contract to submit to arbitration is but matter of remedy incident to jurisdiction under the Act.

POINT II.

The Act should be construed with a view to effectuating its purposes.

The petitioner's challenge to the validity of the Act is scarcely more hostile to it than its other points which all tend to narrow the scope of the Act, to embarrass procedure under it and to render it as little efficacious as possible, in short, a mere trap of technicalities for those who may rely upon it. The Act should on the contrary be construed in furtherance of its purpose and, as remedial legislation, with a view to facilitating the use of arbitration. The Act was responsive to general public demand from the commercial interests of the country and it would be unbecoming for the courts to assume that Congress intended rather to disappoint and defeat the expectations of the commercial community than to give them effect.

We may say of the United States Arbitration Act what this Court has said of the Limited Liability Act in *Providence & New York S. S. Co.* vs. *Hill Mfg. Co.*, 109 U. S. 578, 588, 589, 590:

> "In these provisions of the statute we have sketched in outline a scheme of laws and regula-

tions for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of it administer it in a spirit of fairness, with the view of giving to ship owners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before stated) will be of the last importance; but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the ship owner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. * * *

We have said that, by the provisions of the act, the scheme was sketched in outline. A reference to its provisions shows that it was only in outline; and that the regulation of details as to the form and modes of proceeding was left to be prescribed by judicial authority. The law was evidently drawn in view of similar laws adopted and in operation in England and in some of the States. It laid down a few general principles and propositions, and left it to the courts to enforce them and carry them into practical effect."

The court should construe the United States Arbitration Act in a similar spirit instead of seeking to clip the wings of the statute.

POINT III.

Section 8 of the Act, referring to causes of action otherwise justiciable in admiralty, is independent of Section 9 referring to agreements for arbitration on which an award has been made and which authorize entry of judgment thereon.

The Act embraces a wide subject, including not only arbitration agreements which have been breached and result in litigation at law, in equity or in admiralty, but also arbitration agreements which have not been breached but upon which an award has been made so that it remains to provide procedure for enforcing the award. The Act is not one all parts of which are to be applied to a single subject-matter but rather one which in different sections deals with various aspects of a diversified subject-matter. Hence it is that Section 8, addressing itself to cases where "the basis of jurisdiction" is "a cause of action otherwise justiciable in admiralty", asserts the independency of its provisions by the express language "notwithstanding anything herein to the contrary". It is these words which the petitioner seeks in effect to delete by the argument that the application of Section 8 must be confined to cases within Section 9.

The provisions of Section 8 are by its terms effective "notwithstanding anything herein to the contrary". Consequently, these provisions are not cut down by the language of Section 9 which has a different comprehension and makes no reference whatever to the causes of action "otherwise justiciable in admiralty" mentioned in Section 8. Both Section 8 and Section 9 begin with "if" but the presupposition to the application of Section 8 is "if the basis of jurisdiction be a cause of action otherwise justiciable in admiralty"—in

which case the court may not only entertain the libel and issue process but after directing the arbitration to proceed may enter a decree upon the award—whereas the hypothesis that authorizes the application of Section 9 is "if the parties in their agreement have agreed that a judgment of the court shall be entered upon the award", etc. These sections deal with unrelated aspects of the subject of arbitration and the emphatic words of Section 8—"notwithstanding anything herein to the contrary"—repel any supposition of their interdependence. The argument that Section 8 is conditioned by Section 9 disregards the language of Section 8 and assumes that the object of the Act is to impede and defeat its own application.

Section 9 contemplates cases where the first application to the court is to confirm the award, the arbitration not having been refused but carried out, whereas Section 8 looks to libel and seizure, application to direct that the arbitration proceed and entry of decree upon the award as incident to the litigation.

Under Section 4, the party demanding arbitration may petition any court of the United States which, save for the arbitration agreement, would have jurisdiction at law, in equity or in admiralty of a suit arising out of the controversy. In respect of admiralty causes involving seizure, Section 8 makes special provision. In controversies at law or in equity, however, residence is an important factor while it is quite immaterial to an admiralty proceeding *in rem*. Section 9 relaxes the requirements as to residence in actions at law and suits in equity in the class of cases specified in Section 9, *i. e.*, cases where an award has been made under an arbitration agreement providing that a judgment of the court shall be entered upon the award, whether specifying the court or not as the case may be and whether the adverse party be resident within the jurisdiction or not.

The petitioner asserts in its brief (middle p. 21) that Section 8 in and of itself grants no power to order arbitration but this is to overlook the express words of the section that "the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award." Quite apart, therefore, from anything else in the Act, Section 8 authorizes the court in cases otherwise justiciable in admiralty to direct the parties to proceed with the arbitration and upon the award of arbitrators to enter a decree of court.

An equally misleading statement appears in the first paragraph of page 22 of the petitioner's brief where it is asserted that, under the provisions of Section 9, Sections 10 and 11 apply only to proceedings under Section 9. Such is not the fact but on the contrary there is not a word in Sections 10 and 11 (relating to the vacation, modification or correction of awards) qualifying their scope by reference to Section 9. The only reference in Section 9 to Sections 10 and 11 is not one which confines Sections 10 and 11 to cases within Section 9 but one which applies Sections 10 and 11 to cases within Section 9, *i. e.*, "thereupon the court must grant such an order unless the award is vacated, modified or corrected as prescribed in the next two sections." We have no doubt that Sections 10 and 11 are applicable to cases in admiralty arising under Section 8 as well as to cases at law or in equity and also to awards made in controversies submitted to arbitration without the necessity of litigation to compel such submission. Our contention is that Section 9 is not a qualification of Section 8 which is designed to give free play to the admiralty jurisdiction, unhampered by technicalities foreign to it, so that, except for the substitution of arbitration in the place and stead of trial of the merits before the court and reference to a commissioner to ascertain damages, "the usual course of admiralty proceedings" will follow its ordinary tenor.

POINT IV.

The action is *in rem* within Section 8.

The libel is *in rem* against the tug Gerald A. Fagan as well as *in personam* against Marine Transit Corporation. The Marine Transit Corporation appears in the case both as respondent (being sued *in personam*) and as claimant (having claimed the tug). It is too late to raise on appeal the question, not raised in the District Court, whether such joinder, common enough in practice, is authorized by the rules.

> *Merritt & Chapman Derrick & Wrecking Co.* vs. *Chubb*, 113 Fed. 173, 176 (2nd C. C. A.).

The libel announces "a cause of contract, collision and cargo damage" (R. 3), counts upon a booking contract (R. 5) and sets forth the circumstances of the loss (R. 5, 6). The allegations as to the barge John E. Enright may be disregarded as not affecting the petitioner or enuring to its advantage and as having been abandoned when it turned out that the John E. Enright was not steering. So far as the petitioner is concerned, the libel presents a very usual statement of a contract of carriage and loss of cargo by its breach.

In admiralty it is immaterial whether the libel against a carrier sounds in tort on in contract.

> *California-Atlantic SS. Co.* vs. *Central Door & Lumber Co.*, 206 Fed. 5, 7 (9th C. C. A.); *Rainey* vs. *New York & P. S. S. Co., Ltd.*, 216 Fed. 449, bottom p. 452 (9th C. C. A.).

As said in *Dampskibs Aktieselskabet Thor* vs. *Tropical Fruit Co.*, 281 Fed. 740, 742:

> "It is not necessary to pick and choose between the various schemes of law presented by the pleadings. It is sufficient to apply the doctrine of *The*

Volunteer, 149 Fed. 723, 79 C. C. A. 429, viz.: that it is the practice in admiralty to bring all parties before the court, and to determine the controversy on the merits as it appears from the proof, regardless of technicalities of pleadings—always assuming (as may be done here) that no party is surprised or injured by that equitable proceeding."

The petitioner's real quarrel is with the scheme of the Act itself which in Section 8 designs to combine an arbitration proceeding with a proceeding *in rem*. Such arbitration is necessarily between the libellant and the claimant, if the owner claims, or, if the master should claim, between the libellant and the claimant's principal. The procedure followed below was in strict conformity with Section 8 which authorizes libel and seizure, *i. e.*, a proceeding *in rem*, direction that the parties, *i. e.*, the libellant and the claimant, proceed with the arbitration, and entry of decree upon the award. Such decree would in any case run against the *res* if not released or against claimant and stipulators if a stipulation be substituted for the vessel as in the case at bar.

The petitioner's entire argument on the subject ignores the fact that the Marine Transit Corporation was claimant as well as respondent, that the liability *in rem* arose out of its personal contract and was the same liability whether enforced against the Marine Transit Corporation or against the *res* or against the stipulator. The liability was essentially the same whether enforced against the carrier *in personam* or against the vessel *in rem*; the difference is but one of process and procedure.

The Steamer St. Lawrence, 1 Black (66 U. S.) 522, top p. 529.

So essentially the same is the position of the party liable, whether in form as respondent or as claimant, that even on appeal a libel *in rem*—not rightly brought in that form for want of a lien—has been amended so as to be a libel *in personam* against the claimant.

The Susquehanna, 267 Fed. 811 (2nd C. C. A.).

POINT V.

Objection to the award as not unanimous is not well taken.

The arbitration was to take place before the Grain Committee of the New York Produce Exchange and the committee made its award, signed by four of its five members. There is no provision in the contract or in the Act of Congress requiring unanimity. It is common knowledge that committees act by a majority vote. The objection now urged was not taken in the affidavits in opposition to the motion to confirm the award when, if taken, that objection could have been met by evidence of the rules under which the committee acts. The objection, if it had any substance, was, therefore, waived and is not available on appeal.

As the New York Court of Appeals said in *Matter of S. A. Wenger & Co., Inc.* vs. *Propper Silk Hosiery Mills, Inc.*, 239 N. Y. 199, 202:

> "The contract provides: 'Sales governed by Raw Silk Rules & Regulations of the Silk Association of America'. The record does not set forth the rules. They are, however, a part of the contract. They confer rights upon both parties."

POINT VI.

The shipment was in fact an international shipment and in any event the Act is applicable in this litigation.

It is not denied that the grain in question here was an article of foreign commerce and that its intrastate movement was only a part of and in aid of its transit in the channels of international trade. Obviously the contract was one "evidencing a transaction *involving* commerce" (Section 2 of the Act) in the limited sense of foreign and interstate commerce (Section 1) and the maritime transaction embraced both a charter party (R. 148) and a bill of lading (R. 163-165) even if Section 8 is to be qualified by Sections 1 and 2 in the face of the language "notwithstanding anything herein to the contrary" by which Section 8 declares itself a separate fountainhead of jurisdiction.

The non-negotiable bill of lading issued by the petitioner recites as a fact—and necessarily as a fact of which the petitioner had notice—that the grain, which was shipped to the order of the Bank of Nova Scotia (R. 164), was "From Ft. William, Ont." and "IN BOND FOR EXPORT" (R. 164, last line) and in consequence the petitioner's bill of lading further provides: "Deliver only on surrender of original Lake Bill of Lading properly endorsed" (R. 165). Thus, the lake bill of lading became a necessary document of title under the canal bill of lading and the continuous movement of the shipment in international commerce was recognized. The bond in such case is given by the carrier under Section 551 of the Act of September 21, 1922, 42 Stat. at L. 975, now Section 451 of Title 19 of the United States Code, reading as follows:

> "451. Carriers of bonded merchandise; designation; bond.—Any common carrier of merchandise

owning or operating railroad, steamship, or other transportation lines or routes for the transportation of merchandise in the United States, upon application and the filing of a bond in a form and penalty and with such sureties as may be approved by the Secretary of the Treasury, may be designated as a carrier of bonded merchandise for the final release of which from customs custody a permit has not been issued."

Section 453 of Title 19 of the United States Code further provides:

"453. Merchandise and baggage which may be transported in bond for exportation; regulations.—Any merchandise, other than explosives and merchandise the importation of which is prohibited, shown by the manifest, bill of lading, shipping receipt, or other document to be destined to a foreign country, may be entered for transportation in bond through the United States by a bonded carrier without appraisement or the payment of duties and exported under such regulations as the Secretary of the Treasury shall prescribe, and any baggage or personal effects not containing merchandise the importation of which is prohibited arriving in the United States destined to a foreign country may, upon the request of the owner or carrier having the same in possession for transportation, be entered for transportation in bond through the United States by a bonded carrier without appraisement or the payment of duty, under such regulations as the Secretary of the Treasury may prescribe."

See *B. & O. R. Co.* v. *Settle*, 260 U. S. 166.

Thus, not only was the shipment in international commerce but the carrier gave bond that it should maintain that character which it does not now lie in the carrier's mouth to deny.

The international character of the shipment may exclude the necessity of arguing the coverage of the Act but we submit that Section 8 contemplates as "the basis of jurisdiction" an admiralty cause of action involving libel and seizure, declares such basis of jurisdiction to be independent of the other provisions of the Act, "notwithstanding anything herein to the contrary", and contains neither the word "commerce" nor the words "maritime transactions" previously defined. As the Circuit Court of Appeals noted (R. 243): "Sections 4 and 8, which permit applications to the court, make no reference to these terms." The significance is that litigation involves a basis of jurisdiction not requiring restatement in the Act and in making agreements to arbitrate enforcible the Act contemplated an enforcibility as broad as the jurisdiction of the Federal courts. No such imperfect result as making the agreement enforcible in certain classes of litigation and not in others of which the Federal courts have cognizance could be intended.

Since Section 4 allows a petition in any court of the United States which, save for the arbitration agreement, would have jurisdiction under the Judicial Code at law, in equity or in admiralty of the subject-matter of a suit arising out of the controversy between the parties and since such jurisdiction extends beyond the terms "maritime transactions" as defined by Section 1 with reference to foreign commerce and "commerce" as defined by Section 1 with reference to foreign and interstate commerce, it is apparent that the application of the Act in litigation is as wide as the jurisdiction of the court and is not confined to cases within the terms "mari-

time transactions'' and ''commerce'' as defined in Section 1. The right to petition a court of the United States to enforce an arbitration agreement is defined in terms of the court's jurisdiction, not in the terms employed in Section 1. The solution cannot be that the jurisdiction is to be confined by implication to terms not mentioned in connection with it and repugnant to the terms in which that jurisdiction is expressed. The solution must be that the sections of the Act relating to litigation are independent of Sections 1 and 2 of the Act and that these sections, within their limits, give validity elsewhere to arbitration agreements not litigated in the Federal courts.

The foregoing construction gives consistent meaning to the Act and finds in it a consistent policy. Any other construction leads to impossible results. If the ''maritime transactions'', including collisions, contemtemplated by Section 1, are confined to foreign commerce, is it to be supposed that Congress contemplated that an arbitration agreement affecting a collision in interstate commerce should not be enforced by a petition under Section 4 of the Act or under Section 8 thereof? What reason for such a policy could be imagined? Is it not to impute folly to Congress to suppose that an arbitration agreement affecting transatlantic liners shall be treated as valid but an arbitration agreement affecting coastwise steamers shall be unenforcible? Is it not equally impossible to comprehend the policy that would deny effect in an admiralty court to an arbitration agreement affecting a ship plying between ports of the same state while giving effect to a similar agreement involving a ship plying between ports of different states? Out of what witch's pot can such confusion come? Is it not, however, a mere restatement of the terms of the Act to say that wherever a court of the United States would have jurisdiction under the judicial Code at law, in equity or in admiralty of the sub-

ject-matter of a suit arising out of the controversy between the parties it may direct that arbitration proceed under a written agreement therefor and that where the basis of jurisdiction is a cause of action otherwise justiciable in admiralty, then, "notwithstanding anything herein to the contrary", the court, after libel filed and seizure made, has jurisdiction to direct the parties to proceed with the arbitration and retains jurisdiction to enter its decree upon the award?

"The party claiming to be aggrieved" under Section 8. is, of course, "a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration," as said in Section 4, and nothing in either section confines such "written agreement for arbitration" to agreements involving "maritime transactions" in the limited sense defined in Section 1 with reference to foreign commerce as distinguished from any subject-matter of which a court of admiralty would have jurisdiction under the Judicial Code in the terms of Section 4 or which, apart from the arbitration agreement, would be justiciable in admiralty in the terms of Section 8.

The suggested construction seems conformable to the explanations of the Act given at the time of its passage, for the House report (No. 96, 68th Congress, 1st session), said:

> "The purpose of this bill is to make valid and enforcible agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction of admiralty, or which may be the subject of litigation in Federal courts."

See also The Congressional Record of February 4, 1925, (Vol. 66, part 3, p. 3004, *i. e.*, 68th Congress, 2d session, Jan. 20-Feb. 7, 1925).

POINT VII.

Decree was properly entered against the petitioner and the stipulator for value of its tug.

Had the decree referred to the Marine Transit Corporation as claimant, instead of respondent, there would be no color for petitioner's Point VII but, as the petitioner was both claimant and respondent, the verbiage is immaterial. Suing both *in rem* and *in personam,* the libellants surely had no less right than if they had sued *in rem* alone. The arbitration was ordered under the *in rem* provisions of the Act (Section 8) and the liability asserted by the libel, arbitrated under the order and adjudicated by the decree was one which bound the tug *in rem* as well as the owner *in personam.* The petitioner not only claimed the tug but signed the stipulation for its release jointly with the Continental Casualty Company, stipulator (R. 25B,) and thereby "the claimant herein and the Continental Casualty Company" agreed to "abide by all orders of the court, interlocutory or final, and pay the amount awarded by the final decree rendered by this court and by any appellate court if an appeal intervene". It is to escape from the obligation so plainly assumed that the petitioner now resorts to metaphysical subtlety.

In the case at bar, the libel was maintainable *in rem* and the stipulation was given as a substitute for the vessel so that the stipulator was liable to the exercise of every authority on the part of the court which it could properly exercise if the thing itself was still in the custody of the court.

The Wanata, 95 U. S. 600, at p. 611;
The Palmyra, 12 Wheat. (25 U. S.) 1.

As Judge Ware said in *Lane* vs. *Townsend*, 1 Ware 286, 293, Fed. Cas. No. 8054:

> "If, therefore, there is an ambiguity in the terms of the stipulation, or the construction of them is doubtful, it is not the intention of the party for which we are to inquire, for the will of the party had nothing to do in determining its conditions; the doubt must be removed by consulting the intention of the court, or the law which required the stipulation and dictated its terms."

See *The Beaconsfield*, 158 U. S. 303.

As the Circuit Court of Appeals for the Fourth Circuit said in *The Glide*, 72 Fed. 200, 202, 203:

> "In other words, the sureties, in great measure, stand in the position of bail to the action. They are not parties to the cause. They are represented by the claimant; they covenant to pay such decree as may be made against him; and the decree against him binds them."

As the Circuit Court of Appeals for the Sixth Circuit said in *The New York*, 104 Fed. 561, 564:

> "Such a bond is not a mere personal security given to the plaintiff, but a security given to the court. It is 'a pledge or substitute for the property proceeded against', and the sureties are not parties to the suit, or entitled to interfere in any way with the management of the suit * * *. Unless some extraneous question arises, involving the scope or obligation of the sureties in such a bond, they are not necessary parties to an appeal taken by any of the parties to the record."

In the case at bar the stipulator has not sought relief special to itself by any appropriate proceeding.

As the Circuit Court of Appeals for the Ninth Circuit said in *Perriam* vs. *Pacific Coast Co.*, 133 Fed. 140, middle p. 144, after citing *The Wanata*, 95 U. S. 600 and *The Belgenland*, 108 U. S. 153:

> "There is implied in these utterances of the court a denial of the right of the sureties to be heard on the appeal as to any matter affecting the merits of the main controversy. No controversy has arisen in this case concerning the liability of the surety company upon its stipulation."

Henry on the Jurisdiction and Procedure of the Admiralty Courts of the United States says (pp. 343, 344):

> "The stipulator is a surety for the claimant, who by entering into the bond becomes individually liable in that cause of action in which he makes claim. Such personal liability does not necessarily arise from the actual ownership by the claimant of the vessel which incurs a maritime lien, as where the whole vessel is chartered to another who sails and provides the funds, or to the master who sails the vessel on shares. The claimant may be master, owner or a foreign consul and the stipulators are the sureties of the claimant who becomes a principal by entering into the stipulation. * * *
>
> The act of 1847 (Rev. Stat. §941), permitting a bond with sureties to be taken by the marshal, provides that the court may enter a decree, and award execution at the same time against the principal and his sureties on the bond given for the release. The same power exists as to stipulation taken by the court on the release of the vessel to the claimant."

Admiralty Rule 8 of the Rules of the District Court for the Southern District of New York prescribes the form of the stipulation—a form which does away with the former requirement of motion for summary judgment against stipulators—and provides in part:

> "Such stipulation shall contain the consent of the stipulators, that if the libellant or petitioner recover, the decree may be entered against them for an amount not exceeding the amount named in such stipulation and that thereupon execution may issue against their goods, chattels, lands, and tenements or other real estate."

The stipulation in the case at bar is in that form (fols. 75, 76). The form of decree cited by opposing counsel in Benedict on Admiralty was entitled in the Eastern District of New York and, as indicated by the footnote thereto, was not entered upon the Southern District form of stipulation.

As far back as 1834 in *The Virgin*, 8 Pet. (33 U. S.) 537, at p. 555, we find a form of decree against claimant and stipulators as follows:

> "And this court, further proceeding to render such decree as the circuit court ought to have rendered in the premises, it is further ordered, adjudged and decreed, that the said claimant, Graf, do forthwith pay into the said circuit court the sum of $1800, being the amount of the appraised value of the said ship Virgin, delivered to him on stipulation, as in the proceedings mentioned, together with interest thereon, at the rate of six percent., from the 24th day of March, 1824, when the same was delivered to him on stipulation as aforesaid, unto the day when the same sum shall be so paid into the circuit court, together with the

costs of the district and circuit courts; and unless he shall do so, within ten days after the said circuit court shall require the same to be done, that execution do issue, in due form of law, upon the stipulation aforesaid, against all the parties thereto. And upon the payment of such sums, then that the claimants, as owners of the said ship Virgin, be and hereby are forever exonerated from all other and further payment in the premises. And it is further ordered, adjudged and decreed, that this cause be remanded to the said circuit court, with directions to carry this decree forthwith into effect."

Very appropriate to the case at bar is the language of Judge Benedict in *Harriman* vs. *The Rockaway Beach Pier Co.*, 8 Fed. 94, bottom p. 95:

"This stipulation was without qualification. It was given voluntarily, and not in obedience to any order of the court. It was not necessary to the defense of the cause, nor in any way compelled. By virtue of this stipulation the defendant acquired possession of property then in the possession of the marshal. Under such circumstances, I do not see how it can be open to stipulators upon that stipulation to say that the court has not acquired jurisdiction to enter a decree upon the stipulation."

Section 8 of the Act, unless it contemplated a nugatory thing, must have intended that a proceeding which begins with the seizure of the property and in which the court retains jurisdiction to enter a decree should end with a decree against the property or against those liable upon the stipulation substituted for the property. Such has been the course of proceedings in the case at bar and the proceeding was ripe for decree, for everything contemplated by Section 8 as precedent to decree had been accomplished.

POINT VIII.

The petition and supporting brief do not conform to the requirements of the rules of this Court prescribing that such petition shall contain only a summary and short statement of the matter involved and the reasons relied on for the allowance of the writ and that the supporting brief must be direct and concise.

Respectfully submitted,

OTTO & LYON,
Proctors for Respondents,
By GEORGE V. A. MCCLOSKEY,
Counsel.

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CHARLES ELMO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 172.

MARINE TRANSIT CORPORATION and Tug "GERALD A. FAGAN" by MARINE TRANSIT CORPORATION, Claimant,

Petitioner,

against

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, co-partners, doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Respondents.

BRIEF FOR RESPONDENTS

OTTO & LYON,
Proctors for Respondents,
By GEORGE V. A. MCCLOSKEY,
Counsel.

INDEX

PAGE

STATEMENT 1

POINT I—The Arbitration Act is constitutional 8

POINT II—Congress in enacting an Arbitration Act had the constitutional competency to confer upon the District Court sitting in admiralty, the procedural power to require specific performance of arbitration agreements affecting causes within its jurisdiction 23

POINT III—The Act should be construed with a view to effectuating its purposes 26

POINT IV—The action was *in rem* within Section 8, which the Courts below have properly construed 28

POINT V—Sections 4 and 8 of the Act, authorizing suit to enforce a violated agreement to arbitrate, are independent of Section 9 which relates, not to proceedings to compel the arbitration, but to proceedings instituted after award 32

POINT VI—The shipment was in fact an international shipment and in any event the Act is applicable in this litigation 35

POINT VII—Decree, with direction for issuance of execution, was properly entered against the petitioner and its stipulator 42

POINT VIII—The objection that the award was not signed by all the arbitrators is insubstantial, was not taken in the District Court and was not assigned as error 49

CONCLUSION—The decision of the Circuit Court of Appeals affirming the decretal order of the District Court should be affirmed by this Court 51

APPENDIX—Text of the United States Arbitration Act, 43 Stat. at L. 883 52

List of Cases Cited.

	PAGE
Atlantic Fruit Co. v. Red Cross Line, 5 F. (2d) 218	13
Atlantic Mut. Ins. Co. v. Alexandre, 16 Fed. 279	44
B. & O. S. W. R. R. Co. v. Settle, 260 U. S. 166	37
Beaconsfield, The, 158 U. S. 303	43
Belgenland, The, 108 U. S. 153	7
Berkovitz, Matter of v. Arbib & Houlberg, Inc., 230 N. Y. 261	8, 9, 13
Bogart v. Steamboat John Jay, 17 How. (58 U. S.) 399	24
Bronx, The, 246 Fed. 809	20
California-Atlantic S. S. Co. v. Central Door & Lumber Co., 206 Fed. 5	31
Dampskibs Aktieselskabet Thor v. Tropical Fruit Co., 281 Fed. 740	31
Eclipse, The, 135 U. S. 599, 608	12, 25
Ex parte Bakelite Corporation, 279 U. S. 438	16
Farrell v. Waterman S. S. Co., 291 Fed. 604, s. c. 286 Fed. 284	17
Gansfjord, The, 25 F. (2d) 736, affirmed 32 F. (2d) 236	14
Glide, The, 72 Fed. 200	43
Hardware Dealers Mut. F. Ins. Co. v. Glidden Co., decided by this Court Nov. 23, 1931	21, 22
Harriman v. The Rockaway Beach Pier Co., 8 Fed. 94	47
Harrison v. Hadley, 2 Dill. 229, Fed. Cas. No. 6137	17
Hartford Accident & Indemnity Co. v. Southern Pacific Co., 273 U. S. 207	25

PAGE

Hollins, Re, 229 Fed. 349 17
Houston, E. & W. Texas Ry. Co. v. United States, 234 U. S. 342, 351, 352 36

Jackson v. Steamboat Magnolia, 20 How. (61 U. S.) 296 15

Kline v. Burke Construction Co., 260 U. S. 226 ..... 15, 16, 18, 19
Knickerbocker Ice Co. v. Stewart, 253 U. S. 149 18

Luckenbach v. Delaware, Lackawanna & Western R. Co., 168 Fed. 560 20

Manley v. Olney, 32 Fed. 708 17
Marchant v. Mead-Morrison Mfg. Co., 29 F. (2d) 40, certiorari denied 278 U. S. 655 13
Mayor, The v. Cooper, 6 Wall. (73 U. S.) 247 16
Merritt & Chapman Derrick & Wrecking Co. v. Chubb, 113 Fed. 173 30
Minnesota Rate Cases, The, 230 U. S. 352, 399 36

New York, The, 104 Fed. 561 44
Northern Star, The, 271 U. S. 552 24
Norwich Co. v. Wright, 13 Wall. (80 U. S.) 104 25
No. 6, The, 241 Fed. 69 24

Palmyra, The, 12 Wheat. (25 U. S.) 1 43
Perriam v. Pacific Coast Co., 133 Fed. 140 43
Providence & New York S. S. Co. v. Hill Mfg. Co., 109 U. S. 578 27
P. R. R. No. 35, The, 48 F. (2d) 122 20

Rainey v. New York & P. S. S. Co., Ltd., 216 Fed. 449 31
Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109 ..... 10, 12

PAGE

Sacramento Nav. Co. v. Salz, 273 U. S. 326 30
Shrauger & Johnson v. Phillip Bernard Co., 240 Fed. 131 17
Shreveport Case, The, 234 U. S. 342, 351, 352 36
Southern Pacific Co. v. Jensen, 244 U. S. 205 .... 18, 23
Steamer St. Lawrence, The, 1 Black (66 U. S.) 522 32

United States v. Burlington & Henderson County Ferry Co., 21 Fed. 331 16

Virgin, The, 8 Pet. (33 U. S.) 537 46

Wanata, The, 95 U. S. 600 43
Washington, State of v. W. C. Dawson & Co., 264 U. S. 219 17
Wenger & Co., Inc., Matter of S. A. v. Propper Silk Hosiery Mills, Inc., 239 N. Y. 199 51
Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co., 257 U. S. 563, 589, 590 36
Zip Mfg. Co. v. Pep Mfg. Co., 44 F. (2d) 184 29

TEXTS.

Benedict on Admiralty, Volume 2, pages 490, 491 .. 46

Henry, Jurisdiction and Procedure of the Admiralty Courts of the United States, pages 343, 344 ... 42

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Supreme Court of the United States

OCTOBER TERM, 1931—No. 172.

MARINE TRANSIT CORPORATION and Tug "GERALD A. FAGAN" by MARINE TRANSIT CORPORATION, Claimant,

Petitioner,

against

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, co-partners doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Respondents.

BRIEF FOR RESPONDENTS.

Statement.

This case comes up on *certiorari* to the Circuit Court of Appeals for the Second Circuit which affirmed—with opinion reported in 49 F. (2d) 215 and appearing in the record, R. 241-246—a final decretal order in admiralty (R. 214, 215) entered upon an award of arbitrators in favor of the respondents as libellants seeking a recovery for loss of cargo in a proceeding which was commenced by filing libel in the Southern District of New York (R. 3-9) and in which an order (R. 26, 27),

subsequently resettled on consent (R. 28, 29), was entered directing that arbitration proceed.

The libel was filed *in rem* against the tug "Gerald A. Fagan"—as well as against the barge "John E. Enright" as to which latter boat proceedings were abandoned—and *in personam* against the Marine Transit Corporation, which appeared both *in personam* and as claimant, giving a stipulation for value (R. 25-A, 25-B) to release the tug. The stipulation, in accordance with the District Court rule on the subject, was conditioned that if the claimant and its stipulator should abide by all orders of the court, interlocutory or final, and pay the amount awarded by the final decree, etc., the stipulation should be void but otherwise should remain in full force and virtue (R. 25-B). The decretal order, from which the Marine Transit Corporation appealed as "claimant and respondent" (R. 227), accordingly directed that execution issue against Marine Transit Corporation and its stipulator. The stipulator never entered an order of severance and took no appeal although much of the petitioner's argument is directed to supposed rights of the stipulator.

The proceedings in the District Court were taken under authority of Section 8 of the United States Arbitration Act, which section, consistently ignored in the petitioner's brief, contemplates by its express terms the union of a proceeding *in rem*, i. e., against the vessel or upon the stipulation substituted therefor, and an arbitration proceeding, i. e., between the libellant and the claimant. Section 8 reads as follows:

> "That if the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel

or other property of the other party according to the usual course of admiralty proceedings, and the Court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award."

The full text of the Act, as it appears, unedited, in 43 Stat. at L. 883 is made an appendix to this brief.

We can not too soon set right a fundamental misconception that permeates the petitioner's brief, particularly pages 20, 21 thereof, the notion that in this case a decree *in rem* has been given in an action *in personam*. This is to ignore the facts (1) that the action is *in rem* as well as *in personam* and the ground of action, i. e., the tug's negligence, equally charges the tug *in rem* and the owner *in personam*, (2) that a stipulation for the value of the *res* was subscribed and executed by the petitioner as well as its stipulator, (3) that the subject-matter of the arbitration was the question of the tug's negligence in the performance of the owner's contract referred to in the orders directing such arbitration and (4) that the decretal order confirming the award directs payment in accordance with the stipulation for value. The case is one, therefore, which was commenced by a libel *in rem* against the tug and not merely *in personam* against the petitioner and in which a stipulation for release from seizure was given by the petitioner as claimant of the tug. It is an action instituted in accordance with the terms of Section 8. No question of a deviation from the procedure authorized by Section 8 (if constitutional) properly exists in the case. The cause of action was justiciable in admiralty apart from the arbitration agreement, i. e., the charter party clause incorporated by reference in the booking contract covering the cargo. The District Court exercised jurisdiction to direct the parties to proceed with the arbitration and, after

the arbitrators took the testimony on the issue of the tug's negligence, heard the arguments of counsel thereon and made an award of damages, the District Court entered its decretal order upon the award. As stated by the Circuit Court of Appeals (R. bottom 245, top 246):

> "The decree necessarily would be in the usual form of a decree *in rem,* against the *res* if not released, or against the claimant and stipulators, if the stipulation is substituted for the vessel. The appellant appears as respondent in the *personam* libel and as claimant in the *in rem* proceeding. This practice is common."

It should also be noted—although we contend that jurisdiction under Section 8 is not dependent upon the fact—the shipment was in fact of an international character and the contract for the transportation of the grain from Buffalo to New York was a contract involving foreign commerce as the grain was an article of foreign commerce and by the petitioner's bill of lading was declared to be "in bond for export" (R. bottom 164), i. e., covered by the petitioner's bond to the United States Government as destined to a foreign country. It is an understatement (petitioner's brief, top p. 2) to say that Dreyfus & Company received the grain in bond for export; the petitioner so carried it (bill of lading, R. bottom 164) and further recognized its international character by the proviso (R. 165): "Deliver only on surrender of original Lake Bill of Lading properly endorsed." As the Circuit Court of Appeals found regarding this cargo of grain (R. 244):

> "It was shipped to the order of the Bank of Nova Scotia from Ft. William, Ontario, and 'in bond for export,' and appellant's bill of lading provided:

'Deliver only on surrender of original Lake Bill of Lading properly endorsed.' The lake bill of lading recognized the shipment as international. The bond is given by the carrier."

The petitioner agreed to furnish the respondents as charterers insurable canal tonnage for about 200,000 bushels of wheat on the Buffalo-New York portion of an international carriage from Ft. William, Ontario for export. The booking contract (R. 147, 148) in its final clause incorporated by reference the terms of the New York Produce Exchange Canal Grain Charter Party No. 1 as amended. Such charter party (R. 149-156) concludes with an arbitration clause (R. 156) requiring disputes thereunder to be arbitrated before the Committee on Grain of the New York Produce Exchange.

Some 19,200 bushels, out of the total of 200,000, were laden upon the barge "Edward A. Ryan" which, while entering the U. S. Government lock at Troy in tow of the petitioner's tug "Gerald A. Fagan," struck the guide wall, stove in her planking and sank. All the maneuvering had to be done by the tug: the barge "John E. Enright," the second boat in the tow, was not steering (R. 91) so that she was obviously not liable and when the arbitration was ordered, all further proceedings against the barge "John E. Enright" were abandoned. Although a formal discontinuance as against the "John E. Enright" was omitted in the decretal order confirming the award, such formal discontinuance was thereafter entered (R. 235).

An order directing that arbitration proceed was entered on August 28, 1929 (R. 26, 27) and resettled on consent on September 6, 1929 (R. 28, 29) so as to conform to the terms of the memorandum decision of the District Court (Hon. ALFRED C. COXE, D. J., R. 25-I) and to substitute the words "any and all issues under the

contract" for the words "any and all disputes and controversies under the contract." The Committee on Grain, whose proceedings embrace pages 30-146 of the record, made an award that the Marine Transit Corporation pay Louis Dreyfus & Company $23,016 plus interest amounting to $1,668.66 and costs and expenses of the arbitration in the sum of $362.50 (R. 166).

Louis Dreyfus & Company moved for confirmation of the award (R. 167-174) and such confirmation was opposed upon affidavits assailing the arbitrators and asserting the application of the Harter Act (R. 175-183). Affidavits in reply were filed (R. 184-210). Hon. FRANCIS G. CAFFEY, D. J. ruled that the award should be confirmed and in his memorandum opinion said (R. 213):

> "The issues heard and decided by the arbitrators were within the terms of the order referring the matter to them, as well as within the terms of the agreement to arbitrate. I discovered nothing irregular in the proceedings."

The final decretal order now under review was thereupon entered (R. 214, 215), confirming the award, awarding judgment accordingly and directing that in default of payment within the usual period execution should issue against the Marine Transit Corporation and Continental Casualty Company, stipulator.

The grounds urged on appeal were not urged in opposition to the confirmation of the award but after the entry of the final order the petitioner procured an order requiring the libellants to show cause why they should not be restrained from recovering from the claimant or its stipulators on behalf of the tug "Gerald A. Fagan" (R. 216, 217). Affidavits were filed on both sides (R. 218, 222). Hon. FRANCIS G. CAFFEY, D. J. denied the petitioner's application and handed down an opinion as follows (R. 223, 224):

"In consequence of the proceeding being *in rem*, libellant would have been entitled to have the tug arrested and held as security for the cause of action alleged in the libel. The stipulation for value stands in the place of the tug as security and is subject to the authority of the court that would be applicable to the tug if it were now in custody (United States v. Ames, 99 U. S. 35, 36). By force of the arbitration statute (9 U. S. C., Sec. 8) the reference to arbitration of the dispute, covered by the pleadings, did not diminish or impair the jurisdiction of this court to make the same decree that it would have granted if, after trial, it had reached the same conclusion as the arbitrators. If a plenary trial had occurred, then, according to the usual practice in admiralty, the court might properly direct execution against the stipulator for enforcement of the decree (The Wanata v. Avery, 95 U. S. 600, 616). This would be in conformity with local admiralty rule 8, as well as the condition of the stipulation itself. For this purpose notice to the stipulator is not required and the decree may be entered summarily (28 U. S. C., Sec. 754; The Belgenland, 108 U. S. 153, 156; Johnson v. Chicago and Pacific Elevator Co, 119 U. S. 338, 401). It follows that inclusion in the decree on the award of the provision it contains with respect to execution against the stipulator is correct."

An order was entered accordingly (R. 225).

Nowhere in the District Court prior to the taking of the appeal was the constitutionality of the Act of Congress questioned in this case.

The Marine Transit Corporation filed assignments of error (R. 229-232) and additional assignments of error (R. 233, 234) which did not assign as error Point VIII of its brief in this Court.

POINT I.

The Arbitration Act is constitutional.

The Arbitration Act is a procedural statute and as such entirely within the competency of Congress which has power (Constitution of the United States of America, Article I, Section 8, clause 9) "to constitute tribunals inferior to the Supreme Court," *i. e.*, "such inferior courts as the Congress may from time to time ordain and establish" (Article III, Section 1) and which has power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof" (Article I, Section 8, clause 18), thereby referring to the power to establish such courts as well as to the power over interstate and foreign commerce (Article I, Section 8, clause 3) and the admiralty and maritime jurisdiction comprised in the judicial power of the nation (Article III, Section 2, clause 1). That the Arbitration Act is in effectuation of the powers so committed to Congress and conductive to the purposes for which its powers were so committed, is too plain for any argument to make it plainer and the policy expressed in the Act has received so universal an approval that it would be strange to find an opposite policy embodied and embedded in the Constitution which was adopted with a view to the distribution of constitutional power between the states and the nation and without any forecast of the argument now presented by the appellant.

In *Matter of Berkovitz* v. *Arbib & Houlberg*, 230 N. Y. 261, the New York Court of Appeals by CARDOZO, J., upholding the New York statute but applying it prospectively only, said (pp. 270, 271):

"The common-law limitation upon the enforcement of promises to arbitrate is part of the law of remedies * * * Arbitration is a form of procedure whereby differences may be settled * * * * * * A promise that differences will be arbitrated is not illegal and a nullity without reference to the law in force when differences arise. Since it is directed solely to the remedy, its validity is to be measured by the public policy prevailing when a remedy is sought. In that respect, it is not different from a promise that future controversies shall be submitted to a court. The jurisdiction of the court at the time of the submission will determine whether the promise is to be rejected or enforced. This is so whether jurisdiction in the interval has been diminished or enlarged."

In the *Berkovitz* case, *supra,* the Court of Appeals considered the validity of the New York statute in its constitutional aspects and its argument is largely applicable here. The Court of Appeals held that the statute was not inconsistent with the constitutional right of trial by jury for that right is one that can be waived and was waived by the consent to arbitrate. The Court of Appeals rejected the argument that the statute abridged the general jurisdiction of the Supreme Court as continued "unimpaired" by the State constitution. The court held that in establishing a Supreme Court to administer the law, the People did not petrify the law which the court was to administer and that the Supreme Court did not lose a power inherent in its very being when it lost power to give aid in the repudiation of a contract, concluded without fraud or error, whereby differences are to be settled without resort to litigation. "For the right to nullify is substituted the duty to enforce." Jurisdiction, the Court of Appeals regarded,

not as renounced but as adapted in the time and manner of its exercise to the convention of the parties. The Court of Appeals concluded (p. 276):

> "We think there is no departure from constitutional restrictions in this legislative declaration of the public policy of the state. The ancient rule, with its exceptions and refinements, was criticized by many judges as anomalous and unjust. * * * It was followed with frequent protest, in deference to early precedents. Its hold even upon the common law was hesitating and feeble. We are now asked to declare it so imbedded in the very foundations of our jurisprudence and the structure of our courts that nothing less than an amendment of the Constitution is competent to change it. We will not go so far. The judges might have changed the rule themselves if they had abandoned some early precedents, as at times they seemed inclined to do. They might have whittled it down to nothing, as was done indeed in England, by distinctions between promises that are collateral and those that are conditions * * *. No one would have suspected that in so doing they were undermining a jurisdiction which the Constitution had charged them with a duty to preserve. Not different is the effect of like changes when wrought by legislation."

In holding the New York Arbitration Law applicable without constitutional impediment to a charter party embracing an arbitration clause, this Court in *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, thus stated its view of arbitration agreements in terms that anticipate the petitioner's arguments respecting the Act which Congress subsequently adopted, doubtless having that decision in view (pp. 120-123):

"The Federal courts—like those of the states and of England—have, both in equity and at law, denied, in large measure, the aid of their processes to those seeking to enforce executory agreements to arbitrate disputes. They have declined to compel specific performance (*Tobey* v. *Bristol County,* 3 Story 800, 819-826; Fed. Cas. No. 14,065); or to stay proceedings on the original cause of action (Story, Eq. Jr. § 670). They have not given effect to the executory agreement as a plea in bar, except in those cases where the agreement, leaving the general question of liability to judicial decision, confines the arbitration to determining the amount payable, or to furnishing essential evidence of specific facts, and makes it a condition precedent to the cause of action. *Hamilton* v. *Liverpool & L. & G. Ins. Co.,* 136 U. S. 242, 255; 34 L. ed. 419, 423; 10 Sup. Ct. Rep. 945; *Martinsburg & P. R. Co.* v. *March,* 114 U. S. 549; 29 L. ed. 255; 5 Sup. Ct. Rep. 1035. But an agreement for arbitration is valid, even if it provides for the determination of liability. If executory, a breach will support an action for damages. *Hamilton* v. *Home Ins. Co.,* 137 U. S. 370, 385, 386; 34 L. ed. 708, 713; 11 Sup. Ct. Rep. 133. If executed—that is, if the award has been made—effect will be given to the award in any appropriate proceeding at law or in equity. *Karthaus* v. *Yllas Y. Ferrer,* 1 Pet. 222; 7 L. ed. 121; *Burchell* v. *Marsh,* 17 How. 344; 15 L. ed. 96; *Bayne* v. *Morris,* 1 Wall, 97; 17 L. ed. 495. And, although there is no Federal legislation on the subject, an executory agreement, however comprehensive, will, if made a rule of court, be enforced in courts of the United States by any appropriate process. *Hecker* v. *Fowler,* 2 Wall. 123; 17 L. ed. 759.

In admiralty, also, agreements to submit controversies to arbitration are valid. Reference of maritime controversies to arbitration has long been common practice. *Houseman* v. *The North Carolina,* 15 Pet. 40, 45; 10 L. ed. 653, 655. The insertion in a charter party of a provision for such settlement of disputes arising thereunder was practiced, at least as early as the eighteenth century. *Thompson* v. *Charnock,* 8 T. R. 139; 101 Eng. Reprint 1310. For breach of an executory agreement a libel for damages will lie. An executory agreement may be made a rule of court. *United States* v. *Farragut,* 22 Wall. 406, 419; 22 L. ed. 879, 883; *Kleine* v. *Catara,* 2 Gall. 61; Fed. Cas. No. 7,869. An award will be given full effect. The agreement, whether executory or executed, cannot be enforced in admiralty by specific performance; merely because that court lacks the power to grant equitable relief. *The Eclipse* (*Rea* v. *The Eclipse*), 135 U. S. 599, 608; 34 L. ed. 269, 272; 10 Sup. Ct. Rep. 873. The executory agreement (perhaps in deference to the rule prevailing at law and in equity) will not be given effect as a bar to a libel on the original cause of action. The reluctance of the admiralty court to lend full aid goes, however, merely to the remedy. The substantive right created by an agreement to submit disputes to arbitration is recognized as a perfect obligation." (Foot-notes omitted.)

As it has been held that "the reluctance of the admiralty court to lend full aid goes, however, merely to the remedy" and that "the substantive right created by an agreement to submit disputes to arbitration is recognized as a perfect obligation" (*Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109, 123), it is not reasonable to find the Arbitration Act unconstitutional for

supplying the remedy appropriate to the recognized substantive right. In *Marchant* v. *Mead-Morrison Mfg. Co.*, 29 F. (2d) 40, (2nd C. C. A.), certiorari denied 278 U. S. 655, in directing the District Court to remand compulsory arbitration proceedings under the New York statute to the state courts, the Court said:

> "The proceeding from the outset had all the elements of a judicial controversy, to wit, adversary parties and an issue, in which the claim of one of the parties against the other, capable of pecuniary estimation, was stated and answered in the same form of pleading. All this was addressed to the Supreme Court of the state, functioning as a judicial tribunal. *Gaines* v. *Fuentes*, 92 U. S. 10; 23 L. ed. 524. The appointment of the arbitrator was but a step in the relief sought by the plaintiff from the damages inflicted by the breach of the contract."

By parity of reasoning, under the United States Arbitration Act, the appointment of arbitrators is but a step in a proceeding presenting all the elements of a judicial controversy and this is more obviously true under Section 8 of the Act, pursuant to which the proceeding is commenced by libel and seizure "according to the usual course of admiralty proceedings."

As Judge CARDOZO suggested in the *Berkovitz* case, *supra*, that in establishing a Supreme Court, the People of the State did not petrify the law, which the court was to administer, so, in conferring admiralty and maritime jurisdiction upon the United States Government the Constitution of the United States did not petrify the maritime law.

In *Atlantic Fruit Co.* v. *Red Cross Line*, 5 F. (2d) 218; 2nd C. C. A., considering the question whether the

New York statute on the subject affected recourse to admiralty and suggesting that the situation there depicted was "one that calls for remedial action," the Court said, at bottom page 219:

> "* * * It is entirely plain that this matter of arbitration, whether based on a New York statute or resting upon traditional and judge-made law, is wholly matter of remedy."

In *The Gansfjord*, 25 F. (2d) 736, 737—affirmed 32 F. (2d) 236; 5th C. C. A.—BURNS, D. J., said:

> "Certainly Congress may distribute the judicial power as its wisdom, in the light of experience, dictates, under its broad powers to regulate commerce, etc., and to ordain and establish courts inferior to the Supreme Court. If this be so, there can be no question of its rights to prescribe mere procedural forms for the enforcement of remedial legislation in the public interest."

No case questioning the constitutionality of the Act is known to us or cited by opposing counsel. Their whole argument is pervaded by the notion that the judicial power of the nation is communicated to the existing Federal courts by the Constitution of the United States. On the contrary, only the original jurisdiction of the Supreme Court is prescribed by the Constitution and even that court is of statutory organization. The inferior Federal courts have only a statutory jurisdiction and Congress may distribute to them as much or as little of the judicial power of the United States as Congress may see fit. The United States District Courts have no right to any jurisdiction which Congress has withheld and such jurisdiction as it grants must be exercised in ac-

cordance with the procedural requirements of Congressional enactment.

As this Court said in *Jackson* v. *Steamboat Magnolia*, 20 How. (61 U. S.) 296 at page 300:

> "The Constitution, in defining the powers of the courts of the United States, extends them to 'all cases of admiralty and maritime jurisdiction.' It defines how much of the judicial power shall be exercised by the Supreme Court only; and it was left to Congress to ordain and establish other courts, and to fix the boundary and extent of their respective jurisdictions. Congress might give any of these courts the whole or so much of the admiralty jurisdiction as it saw fit. It might extend their jurisdiction over all navigable waters, and all ships and vessels thereon, or over some navigable waters, and vessels of a certain description only."

In *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 233, 234, this Court, referring to the provisions of the Constitution respecting the judicial power, said:

> "The effect of these provisions is not to vest jurisdiction in the inferior courts over the designated cases and controversies but to delimit those in respect of which Congress may confer jurisdiction upon such courts as it creates. Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution."

Nothing to the contrary was suggested in *The Mayor* v. *Cooper,* 6 Wall. (73 U. S.) 247, where this Court said (pp. 251, 252):

> "How jurisdiction shall be acquired by the inferior courts, whether it shall be original or appellate, or original in part and appellate in part, and the manner of procedure in its exercise after it has been acquired, are not prescribed. The Constitution is silent upon those subjects. They are remitted without check or limitation to the wisdom of the legislature."

The construction given by this Court in *Kline* v. *Burke Construction Co.,* 260 U. S. 226 to the expressions quoted by the petitioner from *The Mayor* v. *Cooper, supra,* at page 13 of the petitioner's brief, appears from the opinion of Justice SUTHERLAND, 260 U. S. 226 at page 234:

> "The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. The Mayor v. Cooper, 6 Wall. 247, 252."

The distinction between courts which Congress creates in the distribution of the judicial power of the Federal Government and courts created in the exercise of other powers—a distinction taken in such cases as *Ex Parte Bakelite Corporation,* 279 U. S. 438 (denying a writ of prohibition to the Court of Customs Appeals established in the exercise of the power to lay and collect duties, etc.) and summarily expressed by the terms "constitutional courts" and "legislative courts"—is quite aside from the present purpose.

The cases of *United States* v. *Burlington & Henderson County Ferry Co.,* 21 Fed. 331, sustaining exceptions to

an answer to a libel of information, the libel charging carriage of an excess number of passengers and a failure to carry the required number of life-boats and life-preservers and the answer raising the question whether Congress could regulate the navigation of vessels floating on the navigable waters of the United States when engaged exclusively in the domestic commerce of the states, *Harrison* v. *Hadley,* 2 Dill. 229; Fed. Cas. No. 6137, denying jurisdiction in equity of a proceeding to contest in a United States court the title to a state office and sustaining a demurrer to the bill, *Manley* v. *Olney,* 32 Fed. 708, remanding a cause as not removable under the Acts of Congress then in force and holding that the right of a non-resident to have his case tried by a Federal court is not a constitutional right, that Congress may grant or withhold altogether jurisdiction over removal cases and that the jurisdiction which it has power to grant it has power to withdraw, do not favor the petitioner's Point II under which they are cited. *Shrauger & Johnson* v. *Phillip Bernard Co.,* 240 Fed. 131, denying an application for a temporary injunction upon an alleged independent cause of action for unfair competition in an action between residents of the same state, and *In re Hollins,* 229 Fed. 349 (2nd C. C. A.), holding that the District Court, sitting in bankruptcy, had no jurisdiction to entertain certain proceedings instituted after the court made an order confirming an offer of composition, thereby taking the estate out of the bankruptcy court, are remote from any subject here involved.

The petitioner cites *Farrell* v. *Waterman S. S. Co.,* 291 Fed. 604, enlarging upon the opinion of the same judge in 286 Fed. 284. The point decided was the invalidity of the Act of June 10, 1922, c. 216; 48 Stat. at L. 634, which the following year was held unconstitutional by this Court in *State of Washington* v. *W. C. Dawson & Co.,* 264 U. S. 219. The ground of decision in this Court

was that the Act (purporting to reserve to compensation claimants, other than the master or members of the crew of a vessel, their rights and remedies under workmen's compensation laws and rendering such rights and remedies exclusive of any remedy in admiralty) was unconstitutional as an attempt to delegate to the several States the legislative power of Congress and as subjecting to conflicting State legislation a subject which the Constitution had designed for uniform regulation. In the opinion of Judge ERVIN, in 291 Fed. 604, much was said that finds no recognition in the decisions of this Court and at the bottom of page 611 the District Court even asserted that the opinion of this Court in *Kline* v. *Burke Construction Co.*, 260 U. S. 226, was in conflict with the reasoning of *Knickerbocker* v. *Stewart*, 253 U. S. 149 and *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205—an entirely inadmissible supposition. It was State legislation that was held invalid in its application to a longshoreman killed on navigable waters in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 and it was State legislation under purported authority of an Act of Congress (Act of October 6, 1917, c. 97, 40 Stat. at L. 395) that was held invalid in its application to a case arising out of the drowning of a bargeman in navigable waters in *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149. In the former case a State workmen's compensation law was deemed an infringement of the uniformity necessary to the maritime law. In the latter case the same consideration governed with the further ruling that such infringement may not be authorized by Congress in the exercise of a power conferred by the Constitution to preserve the uniformity of the maritime law. Whatever withdrawal of federal court jurisdiction may have been involved in *Knickerbocker Ice Co.* v. *Stewart*, *supra*, and *State of Washington* v. *W. C. Dawson & Co.*, *supra*, was incidental to the purpose of enabling State legis-

lation to invade the maritime law and the incident fell with the major purpose. The provisions made in the Act of June 10, 1922, to authorize compensation remedies before State tribunals and to withdraw admiralty jurisdiction in such cases from the United States District Court were so conjoined and so correlative that the jurisdiction could not well have been intended to be withdrawn when the substituted remedy, for constitutional reasons, proved unavailable. What was furthest from the intention of Congress was that the worker should fall between two stools, between a jurisdiction effectively withdrawn and a remedy ineffectively offered. This Court dealt with the subject as a conflict between State and national jurisdiction to legislate. In *Kline* v. *Burke Construction Co., supra,* no question of the scope of the legislative power of state and nation was involved. This Court had before it the question whether the pendency of an action at law in the United States District Court, the jurisdiction of which rested upon the ground of diversity of citizenship, authorized the issuance of an injunction restraining the prosecution by the defendant in such action at law of an equity proceeding against the plaintiff in the action at law and such plaintiff's sureties, both actions being *in personam* and presenting substantially the same issues but with the addition of the sureties as parties defendant in the equity suit. This Court held that the party suing in the Federal courts had no constitutional right to such restraint of the State court action and in that connection use the expressions above quoted.

The Circuit Court of Appeals in the case at bar was abundantly sustained by authority in ruling (R. 243):

> "Inferior federal courts have only statutory jurisdiction, and Congress may grant as much or little of the judicial power as it will. It has been long

settled that the district courts have only such right to jurisdiction as Congress grants, and it may withhold jurisdiction in accordance with the procedural requirements of Congressional enactment."

The Act, so far from depriving the district courts of jurisdiction—for all their jurisdiction, as we have seen, is purely statutory, not by constitutional grant—has enlarged their jurisdiction to embrace the enforcement of arbitration agreements, not only by ordering such arbitration to proceed but by entering decree upon the award. The award of arbitrators has been given effect, without aid of statute, where the parties voluntarily proceeded with the arbitration. In requiring an unwilling party, by force of the statute, to proceed with the arbitration, the court gives essentially the same effect to the award when rendered. If an arbitrator, though chosen by the parties prior to controversy, is a constitutional stumbling-block, we wonder how special commissioners in admiralty have been so much in use since the organization of the Government under the Constitution. The petitioner's argument is as applicable to the one as to the other. Even the merits of a cause may by consent of parties, though not otherwise save in exceptional conditions as in *The P. R. R. No. 35*, 48 F. (2d) 122, be referred to a commissioner (*The Bronx*, 246 Fed. 809, 2nd C. C. A.; *Luckenbach* v. *Delaware, Lackawanna & Western R. Co.*, 168 Fed. 560) and it is precisely such consent that supports a reference to arbitrators.

The petitioner's suggestion that the Arbitration Act gives judicial power to laymen curiously ignores the historical fact that laymen, in the form of a jury, have long had their part in the functioning of the courts and the use of a jury in admiralty in certain Great Lakes cases is provided for by Revised Statutes Section 566, now embodied in the United States Code, Title 28, Sec-

tion 770. The petitioner itself declares a board of arbitrators "very similar to a jury" (petitioner's brief, p. 30). The distinction between lawyers and laymen is certainly not embedded in the Constitution and in fact we know of no Act of Congress requiring district judges to be lawyers.

In *The Hardware Dealers Mutual Fire Ins. Co. of Wisconsin* v. *The Glidden Co.*, decided by this Court November 23, 1931 (not yet reported) and sustaining a Minnesota statute requiring the insurer to incorporate in its policy standard form arbitration provisions which had the effect of making the decision of the arbitrators determinative of the amount of loss, this Court said:

> "Granted, as we now hold, that the State, in the present circumstances, has power to prescribe a summary method of ascertaining the amount of loss, the requirements of the Fourteenth Amendment, so far as now invoked, are satisfied if the substitute remedy is substantial and efficient, see Crane v. Hahlo, 258 U. S. 142, 147. We can not say that the determination by arbitrators, chosen as provided by the present statute, of the single issue of the amount of loss under a fire insurance policy, reserving all other issues for trial in court, does not afford such a remedy, or that in this respect it falls short of due process, more than the provisions of State workmen's compensation laws for establishing the amount of compensation by a commission. New York Central R. R. Co. v. White, 243 U. S. 188, 207-208; Mountain Timber Co. v. Washington, 243 U. S. 219, 235; or the appraisal by a commissioner of the value of property taken or destroyed by the public made controlling by condemnation statutes, Dohany v. Rogers, 281 U. S. 362, 369; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 695; Crane v.

Hahlo, supra, p. 147; or findings of fact by boards or commissions which, by various statutes, are made conclusive upon the courts if supported by evidence, Tagg Bros. & Moorhead v. United States, 280 U. S. 420; I. C. C. v. Union Pacific R. R. Co., 222 U. S. 541; Virginian Ry. Co. v. United States, 272 U. S. 658, 663; Silberschein v. United States, 266 U. S. 221; MaKing Products Co. v. Blair, 271 U. S. 479."

In the course of its opinion in *The Hardware Dealers Mutual Fire Ins. Co. case* this Court noted:

"This type of arbitration clause has long been commonly used in fire insurance policies, both in Minnesota and elsewhere, and, when voluntarily placed in the insurance contract, compliance with its provisions has been held to be a condition precedent to an action on the policy. Gasser v. Sun Fire Office, 42 Minn. 315; Hamilton v. Liverpool, London & Globe Ins. Co., 136 U. S. 242; Scott v. Avery, 5 House of Lords 811, 854; see Red Cross Line v. Atlantic Fruit Co., 264 U. S. 190, 121."

The arbitration clause in the case at bar does not owe its origin to statutory compulsion but to the voluntary and unforced action of the parties. The petitioner is therefore unable to maintain that its constitutional rights have been violated and is driven to contend that the constitutional rights of the courts have been invaded and to sustain that contention by an appeal to the outworn prejudice of another age.

POINT II.

Congress in enacting an Arbitration Act had the constitutional competency to confer upon the district court sitting in admiralty, the procedural power to require specific performance of arbitration agreements affecting causes within its jurisdiction.

The petitioner's argument in favor of the contrary proposition disregards the analogies of our legislative history and confuses two things essentially distinct—jurisdiction over the subject-matter, in respect of which the maritime jurisdiction may not be extended to non-maritime heads, and procedural jurisdiction which may be extended by act of Congress as incident to any maritime subject-matter.

The Constitution (Article III, Section 2) prescribes: "The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction." The subject-matter is thus of constitutional prevision. Neither the substantive law to be applied nor the procedure to enforce it is indicated by the Constitution which conveys to Congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof" (Article I, Section 8, Clause 18).

As this Court said in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 215:

> "Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country."

It is in the exercise of that power that Congress enacted the Limited Liability Act which gave to the courts

the power, certainly of a maritime nature if not previously exercised in the American admiralty, to entertain proceedings for the limitation of the liability of ship owners. Such a proceeding is an independent head of jurisdiction without regard to whether the claims limited against are such as might have been sued upon in the admiralty or not.

The No. 6, 241 Fed. 69, 71 (2nd C. C. A.).

It was in the exercise of that paramount power that Congress enacted the Ship Mortgage Act, 1920 (Act of June 5, 1920, c. 250, 41 Stat. at L. 988), the validity of which was at least assumed in *The Northern Star,* 271 U. S. 552, as it had been assumed in advance in *Bogart* v. *The Steamboat John Jay,* 17 How. (58 U. S.) 399, at page 402, where this Court, after adverting to the English Act giving the admiralty courts an enlarged cognizance of mortgages of ships, said:

> "Until that shall be done in the United States, by Congress, the rule, in this particular, must continue in the admiralty courts of the United States, as it has been."

Now, we do not contend that Congress may enlarge the maritime jurisdiction to embrace subjects without maritime relation but certainly, where such relation exists, Congress may create a statutory jurisdiction not previously in use and in doing so may authorize appropriate remedies, though otherwise unknown to admiralty practice. So in a limitation of liability proceeding, under the Acts of Congress, the admiralty court "in working out its jurisdiction acquired the right to marshall all claims, whether of strictly admiralty origin or not" and further has power "to do what is exceptional

in a court of admiralty—to grant an injunction, and by such injunction bring litigants, who do not have claims which are strictly admiralty claims, into the admiralty court" (*Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 217, 218).

The procedure in limitation proceedings is so far of an equitable character as regards the injunctive relief afforded, the avoidance of a multiplicity of suits, the drawing of all parties into concourse and the distribution of the fund that in *Norwich Company* v. *Wright*, 13 Wall. (80 U. S.) 104, in holding that the court of admiralty was the appropriate court for such proceedings, this Court said at page 123:

> "Congress might have invested the Circuit Courts of the United States with the jurisdiction of such cases by bill in equity, but it did not."

Before the Limited Liability Act was passed the power to grant injunctive relief was as foreign to admiralty procedure as the power to grant specific performance of a contract before the enactment of the Arbitration Act. The power to grant such injunctive relief in proceedings for the limitation of a ship owner's liability is not more necessarily incident to the entertainment of such proceedings than the power to enforce specific performance of an arbitration agreement in proceedings under the Arbitration Act. There is no consistent constitutional principle which can at the same time sustain the granting of injunctive power in limitation proceedings and yet strike down the power to compel specific performance in the case at bar. In *The Eclipse*, 135 U. S. 599, as stated by this Court at the bottom of page 608: "There was nothing maritime about the claims of the interveners, and the intervention was properly dismissed for want of jurisdiction over the sub-

ject-matter." The Arbitration Act, in its relation to the present case, deals with a case where, in the language of the Act itself, the basis of jurisdiction is a cause of action otherwise justiciable in admiralty. The libel charges the tug and carrier with the loss of cargo on a chartered barge. The subject-matter is of immemorial cognizance in the admiralty. All that is new is that the claimant is to be held to its own voluntary agreement to arbitrate the controversy. It is not the inherent power of the court that is involved, but the power of Congress to grant a remedy in aid of a jurisdiction always exercised in the admiralty. No extension of the subject-matter of admiralty jurisdiction is in question. What is questioned is the power of Congress to adapt the procedure of the court to the legislative purpose.

The petitioner under Point II of its brief asserts that the Act of Congress deprives the courts of judicial power but under Point III alleges that the Act enlarges that power beyond constitutional bounds. Such an argument is self-destructive.

POINT III.

The Act should be construed with a view to effectuating its purposes.

The petitioner's challenge to the validity of the Act is scarcely more hostile to it than its other points which all tend to narrow the scope of the Act, to embarrass procedure under it and to render it as little efficacious as possible, in short, a mere trap of technicalities for those who may rely upon it. The Act should on the contrary be construed in furtherance of its purpose and, as remedial legislation, with a view to facilitating the use of arbitration. The Act was responsive to general

public demand from the commercial interests of the country and it would be unbecoming for the courts to assume that Congress intended rather to disappoint and defeat the expectations of the commercial community than to give them effect.

We may say of the United States Arbitration Act what this Court has said of the Limited Liability Act in *Providence & New York S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 588, 589, 590:

> "In these provisions of the statute we have sketched in outline a scheme of laws and regulations for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of it administer it in a spirit of fairness, with the view of giving to ship owners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before stated) will be of the last importance; but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the ship owner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. * * *
>
> We have said that, by the provisions of the act, the scheme was sketched in outline. A reference to its provisions shows that it was only in outline; and that the regulation of details as to the form and modes of proceeding was left to be prescribed by judicial authority. The law was evidently drawn in view of similar laws adopted and in operation in England and in some of the States. It laid down

a few general principles and propositions, and left it to the courts to enforce them and carry them into practical effect."

The court should construe the United States Arbitration Act in a similar spirit instead of seeking to clip the wings of the statute.

POINT IV.

The action was in rem within Section 8, which the Courts below have properly construed.

Two arresting statements appear at the head of petitioner's Point IV, i. e. that the court below held that the provisions of Section 8 of the Act are independent of the other sections of the Act and that Section 8 of the Act has no application to this case. Examination of the opinion of the Circuit Court of Appeals fails to show any statement by that court regarding Section 8 as "independent of the other sections of the Act" but does show that Section 8 has direct application to the case.

We certainly do contend, as the Circuit Court of Appeals by implication held, that Section 8 is in no respect qualified by Section 9 which relates to a different subject-matter as will be argued under Point V of our brief in opposition to Point V of the petitioner's brief. That the provisions of Section 8 are applicable where, to quote its terms, the basis of jurisdiction is a cause of action otherwise justiciable in admiralty, without regard to any limitation on the generality of those terms that may be suggested by arguments from other portions of the act or, again to use its language, "notwithstanding anything herein to the contrary", will be argued under Point VI of this brief in opposition to the petitioner's Point VI.

The Act is to our mind a code embracing various aspects of a large subject involving foreign and interstate

commerce as dealt with in actions at law and suits in equity, also such causes of action as are justiciable in admiralty and the use of proceedings *in rem* in connection with the enforcement of arbitration agreements, stay of suits brought in disregard of such agreements, the determination whether an agreement for arbitration was made, the enforcement of such agreement if made, the enforcement of the award in cases where proceedings to compel performance of the agreement are required and the enforcement of the award where the parties have proceeded with the arbitration without such compulsion, the appointment, procedure and power of arbitrators, the confirmation, vacation, modification or correction of awards, etc. Some provisions of the Act apply to one subject, some to another and to apply every part of the Act to each subject to which any part of it refers is the surest way to make the whole unworkable.

The case of *Zip Mfg. Co.* v. *Pep Mfg. Co.*, 44 F (2d) 184, involved no question presented here. The case cited was a patent infringement case in which the defendant moved for a stay pending arbitration of the issues under Section 3 of the United States Arbitration Act. Such stay was denied upon the ground that the subject-matter was not within the coverage of the Act. It may be noted that the arbitration agreement itself provided for arbitration in accordance with the New York Statutes. The suggestion in the opinion that the Act should be treated as a connected whole and its parts harmonized gives no countenance to a confusion of provisions looking to varying situations within the general scope of the Act.

The petitioner's statement that Section 8 has no application to this case overlooks the fact that the action was *in rem*, that the proceedings conformed to Section 8 of the Act and that it is the very design of that section to combine an arbitration proceeding, necessarily between personal parties, and a remedy *in rem* flowing from the

matters so determined. With such a provision lacking, the Act would be very inadequate for its purpose, as a written agreement of arbitration between a vessel, as such, and a cargo owner is quite unknown.

The libel is *in rem* against the tug "Gerald A. Fagan" as well as *in personam* against Marine Transit Corporation. The Marine Transit Corporation appears in the case both as respondent (being sued *in personam*) and as claimant (having claimed the tug). It is too late to raise on appeal the question, not raised in the District Court, whether such joinder, common enough in practice, is authorized by the rules.

Merritt & Chapman Derrick & Wrecking Co. v. *Chubb,* 113 Fed. 173, 176 (2nd C. C. A.).

The libel announces "a cause of contract, collision and cargo damage" (R. 3), counts upon a booking contract (R. 5) and sets forth the circumstances of the loss (R. 5, 6). The barge "John E. Enright" was joined as owned and operated by the Marine Transit Corporation which, the libel states (R. bottom 3), "owns and/or charters and operates a number of such barges, of which the barge "John E. Enright" is one and Diesel tugs of which the "Gerald A. Fagan" is one. It turned out, however, that the "John E. Enright" was not steering and, although she was operating under charter to the Marine Transit Corporation, the proceedings against her were abandoned. The libel presents, in reference to the petitioner and its tug "Gerald A. Fagan", a very usual statement of a contract of carriage and loss of cargo by its breach.

The "Gerald A. Fagan" was so manifestly the instrument employed by the petitioner in the performance of its contract of transportation that in the lower courts the petitioner claimed the benefit of the Harter Act under *Sacramento Nav. Co.* v. *Salz,* 273 U. S. 326. The appli-

cation of the Harter Act is precluded by the fact that the charter party adopted a rule of liability very different from the Harter Act (R. bottom 153) and, the Circuit Court of Appeals having so held (R. 244), the petitioner has not claimed in this Court the benefit of the Harter Act. The fact that it did so below, however, suffices to demonstrate that the tug was furnished in execution of the transportation contract and, in effect, as part of the carrying vessel.

In admiralty it is immaterial whether the libel against a carrier sounds in tort or in contract.

> *California-Atlantic SS. Co.* v. *Central Door & Lumber Co.*, 206 Fed. 5, 7 (9th C. C. A.);
> *Rainey* v. *New York & P. S. S. Co., Ltd.*, 216 Fed. 449, bottom p. 452 (9th C. C. A.).

See *Dampskibs Aktieselskabet Thor* v. *Tropical Fruit Co.*, 281 Fed. 740, 742.

The petitioner's real quarrel is with the scheme of the Act itself which in Section 8 designs to combine an arbitration proceeding with a proceeding *in rem*. Such arbitration is necessarily between the libellant and the claimant, if the owner claims, or, if the master should claim, between the libellant and the claimant's principal. The procedure followed below was in strict conformity with Section 8 which authorizes libel and seizure, *i. e.*, a proceeding *in rem*, direction that the parties, *i. e.*, the libellant and the claimant, proceed with the arbitration, and entry of decree upon the award. Such decree would in any case run against the *res* if not released or against claimant and stipulators if a stipulation be substituted for the vessel as in the case at bar.

The petitioner's entire argument on the subject ignores the fact that the Marine Transit Corporation was claimant as well as respondent, that the liability *in rem*

arose out of its personal contract and was the same liability whether enforced against the Marine Transit Corporation or against the *res* or against the stipulator. The liability was essentially the same whether enforced against the carrier *in personam* or against the vessel *in rem;* the difference is but one of process and procedure.

> *The Steamer "St. Lawrence",* 1 Black (66 U. S.) 522 top p. 529.

See also our argument under Point VII of this brief.

POINT V.

Sections 4 and 8 of the Act, authorizing suit to enforce a violated agreement to arbitrate, are independent of Section 9 which relates, not to proceedings to compel the arbitration, but to proceedings instituted after award.

Section 9 contemplates cases where the first application to the court is to confirm the award, the arbitration not having been refused but carried out. Hence it is that Section 9 makes provision for determining in what court the application should be made. Such provision would be unnecessary in the case of an action already pending and brought in accordance with the provisions of Section 4, whether at law, in equity or in admiralty. The provisions regarding notice of the application, *e. g.* that upon service thereof on the adverse party the court shall have jurisdiction of such party as though he had appeared generally in the proceeding, are entirely unsuitable to proceedings to compel arbitration in which cases Section 4 makes provision for the district of suit and the manner of service, to which Section 8 adds the special provisions applicable to proceedings *in rem.*

Where the proceeding is to compel arbitration, the district of suit is provided for by the statute in Section 4. Where the proceeding is to confirm an award after arbitration had without proceedings to compel it, the district in which application for confirmation shall be made may be specified by agreement of the parties, or, failing such designation, is declared to be "the district within which such award was made." Evidently the proceedings begin with the award and are concerned only with its enforcement. Section 9 provides for so special a case and is so little a qualification upon the Act as a whole that no other section of the Act refers to Section 9.

Section 4, governing proceedings to compel arbitration, gives jurisdiction thereof to "any court of the United States which, save for such agreement, would have jurisdiction under the Judicial Code at law, in equity or in admiralty of a suit arising out of the controversy between the parties" which, of course, imposes upon such jurisdiction the usual qualifications as to residence—except indeed in proceedings *in rem* to which residence is immaterial and for which provision is made in Section 8 "according to the usual course of admiralty proceedings." Section 9 relaxes the requirements as to residence in personal actions in cases where an award has been made under an arbitration agreement providing that a judgment of the court shall be entered upon the award whether specifying the court or not as the case may be and whether the adverse party be resident within the jurisdiction or not. Such differences in procedure are irreconcilable with identity of subject-matter.

Section 8, addressing itself to cases where "the basis of jurisdiction" is "a cause of action otherwise justiciable in admiralty," indicates the special character and independent efficacy of its provisions by the express language "notwithstanding anything herein to the contrary."

It is these words which the petitioner seeks in effect to delete by confining the application of Section 8 to cases within Section 9, which has a different comprehension and makes no reference to the subject-matter of Section 8. Both Section 8 and Section 9 begin with "if" but the presupposition to the application of Section 8 is "if the basis of jurisdiction be a cause of action otherwise justiciable in admiralty"—in which case the court may entertain the libel, issue process and proceed to decree —whereas the hypothesis that authorizes the application of Section 9 is "if the parties in their agreement have agreed that a judgment of the court shall be entered upon the award," etc. Section 8 contains no reference to Section 9 but independently provides that the court "shall retain jurisdiction to enter its decree upon the award." Any supposition of the interdependency of that provision and of the provisions of Section 9 respecting the confirmation of awards is repelled by the emphatic language of Section 8—"notwithstanding anything herein to the contrary." The argument that Section 8 is conditioned by Section 9 disregards the language of Section 8 and assumes that the object of the Act is to impede and defeat its own application.

It is a fictitious difficulty that the petitioner raises in charging that according to the theory of the court below a decree could be entered in admiralty when a judgment could not have been entered in an action at law. No such difficulty exists, for Section 9 has no reference to an action for specific performance of an agreement to arbitrate, whether such action is brought at law or in admiralty, but contemplates the entry of judgment without action, the parties having voluntarily gone to arbitration under an agreement providing for the entry of judgment upon the award. So understood, Section 9 has its natural place in the scheme of the Act. If, however, Section 9 is to be interpreted as meaning

that every agreement for arbitration shall be nugatory unless containing a specific provision that judgment may be entered upon the award, that should have been said at the outset of the Act, not reserved for the ninth section. The petitioner's contention would deprive the Act of a great part of its efficacy, render it little responsive to the commercial demand that called it into being and make its whole operation dependent upon form.

POINT VI.

The shipment was in fact an international shipment and in any event the Act is applicable in this litigation.

It is not denied that the grain in question here was an article of foreign commerce and that its intrastate movement was only a part of and in aid of its transit in the channels of international trade. Obviously the contract was one "evidencing a transaction *involving* commerce" (Section 2 of the Act) in the limited sense of foreign and interstate commerce (Section 1) and the maritime transaction embraced both a charter party (R. 148) and a bill of lading (R. 163-165) even if Section 8 is to be qualified by Sections 1 and 2 in the face of the language "notwithstanding anything herein to the contrary" by which Section 8 declares itself a separate fountainhead of jurisdiction.

The terms "a contract evidencing a transaction involving commerce" (Section 2) are much broader than a transaction constituting such commerce. It is sufficient that commerce of a foreign or interstate character is involved, *i. e.*, affected, implicated, connected. Foreign commerce is certainly involved even in the intrastate conveyance of an article making by several stages its transit from a foreign country, through this country,

and beyond. There is no reason to suppose that Congress intended to exert less than its full authority over the subject. As this Court said in *The Minnesota Rate Cases*, 230 U. S. 352, 399:

> "The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere."

So in *Houston, E. & W. Texas Ry. Co.* v. *United States* (The Shreveport case), 234 U. S. 342, at pages 351, 352, this Court said:

> "Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field."

See also *Wisconsin R. R. Commission* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 589, 590.

In *B. & O. S. W. R. R. Co.* v. *Settle,* 260 U. S. 166, this Court held that whether a shipment of goods is interstate and therefore subject to the rates provided by the carrier's interstate tariff depends upon the essential character of the movement and that character is not necessarily determined by the contract between shipper and carrier. As this Court said (p. 171):

> "For neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk, is an essential of a through interstate shipment."

If that conclusion is possible where the question is merely one of the application of interstate or intrastate rates, *a fortiori,* where the question relates to the application of an Act of Congress governing interstate and foreign commerce and such Act expressly by its own terms affects contracts evidencing transactions involving such commerce—terms expressive of the most indirect as well as of the most immediate relation—there should be no hesitancy in giving the Act appropriate force.

The non-negotiable bill of lading issued by the petitioner recites as a fact—and necessarily as a fact of which the petitioner had notice—that the grain, which was shipped to the order of the Bank of Nova Scotia (R. 164), was "From Ft. William, Ont." and "IN BOND FOR EXPORT" (R. 164, last line) and in consequence the petitioner's bill of lading further provides: "Deliver only on surrender of original Lake Bill of Lading properly endorsed" (R. 165). Thus, the lake bill of lading became a necessary document of title under the canal bill of lading and the continuous movement of the shipment in international commerce was recognized. The bond in such case is given by the carrier under Section

551 of the Act of September 21, 1922, 42 Stat. at L. 975, made Section 451 of Title 19 of the United States Code and subsequently repealed (only to be reënacted in the Tariff Act of June 17, 1930), reading as follows:

> "451. Carriers of bonded merchandise; designation; bond.—Any common carrier of merchandise owning or operating railroad, steamship, or other transportation lines or routes for the transportation of merchandise in the United States, upon application and the filing of a bond in a form and penalty and with such sureties as may be approved by the Secretary of the Treasury, may be designated as a carrier of bonded merchandise for the final release of which from customs custody a permit has not been issued."

Section 453 of Title 19 of the United States Code further provided:

> "453. Merchandise and baggage which may be transported in bond for exportation; regulations.—Any merchandise, other than explosives and merchandise the importation of which is prohibited, shown by the manifest, bill of lading, shipping receipt, or other document to be destined to a foreign country, may be entered for transportation in bond through the United States by a bonded carrier without appraisement or the payment of duties and exported under such regulations as the Secretary of the Treasury shall prescribe, and any baggage or personal effects not containing merchandise the importation of which is prohibited arriving in the United States destined to a foreign country may, upon the request of the owner or carrier having the same in possession for transportation,

be entered for transportation in bond through the United States by a bonded carrier without appraisement or the payment of duty, under such regulations as the Secretary of the Treasury may prescribe."

Thus, not only was the shipment in international commerce but the carrier gave bond that it should maintain that character which it does not now lie in the carrier's mouth to deny.

The international character of the shipment may exclude the necessity of arguing the coverage of the Act but we submit that Section 8 contemplates as "the basis of jurisdiction" an admiralty cause of action involving libel and seizure, declares such basis of jurisdiction to be independent of the other provisions of the Act, "notwithstanding anything herein to the contrary", and contains neither the word "commerce" nor the words "maritime transactions" previously defined. As the Circuit Court of Appeals noted (R. 245): "Sections 4 and 8, which permit applications to the court, make no reference to these terms." The significance is that litigation involves a basis of jurisdiction not requiring restatement in the Act and in making agreements to arbitrate enforcible, the Act contemplated an enforcibility as broad as the jurisdiction of the Federal courts. No such imperfect result as making the agreement enforcible in certain classes of litigation and not in others of which the Federal courts have cognizance could be intended.

Since Section 4 allows a petition in any court of the United States which, save for the arbitration agreement, would have jurisdiction under the Judicial Code at law, in equity or in admiralty of the subject-matter of a suit arising out of the controversy between the parties and since such jurisdiction extends beyond the terms "mari-

time transactions" as defined by Section 1 with reference to foreign commerce and "commerce" as defined by Section 1 with reference to foreign and interstate commerce, it is apparent that the application of the Act in litigation is as wide as the jurisdiction of the court and is not confined to cases within the terms "maritime transactions" and "commerce" as defined in Section 1. The right to petition a court of the United States to enforce an arbitration agreement is defined in terms of the court's jurisdiction, not in the terms employed in Section 1. The solution cannot be that the jurisdiction is to be confined by implication to terms not mentioned in connection with it and repugnant to the terms in which that jurisdiction is expressed. The solution must be that the sections of the Act relating to litigation are independent of Sections 1 and 2 of the Act and that these sections, within their limits, give validity elsewhere to arbitration agreements not litigated in the Federal courts.

The foregoing construction gives consistent meaning to the Act and finds in it a consistent policy. Any other construction leads to impossible results. If the "maritime transactions", including collisions, contemplated by Section 1, are confined to foreign commerce, is it to be supposed that Congress contemplated that an arbitration agreement affecting a collision in interstate commerce should not be enforced by a petition under Section 4 of the Act or under Section 8 thereof? What reason for such a policy could be imagined? Is it not to impute folly to Congress to suppose that an arbitration agreement affecting transatlantic liners shall be treated as valid but an arbitration agreement affecting coastwise steamers shall be unenforcible? Is it not equally impossible to comprehend the policy that would deny effect in an admiralty court to an arbitration agreement affecting a ship plying between ports of

the same state while giving effect to a similar agreement involving a ship plying between ports of different states? Out of what witch's pot can such confusion come? Is it not, however, a mere restatement of the terms of the Act to say that wherever a court of the United States would have jurisdiction under the judicial Code at law, in equity or in admiralty of the subject-matter of a suit arising out of the controversy between the parties it may direct that arbitration proceed under a written agreement therefor and that where the basis of jurisdiction is a cause of action otherwise justiciable in admiralty, then, "notwithstanding anything herein to the contrary", the court, after libel filed and seizure made, has jurisdiction to direct the parties to proceed with the arbitration and retains jurisdiction to enter its decree upon the award?

"The party claiming to be aggrieved" under Section 8 is, of course, "a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration", as said in Section 4, and nothing in either section confines such "written agreement for arbitration" to agreements involving "maritime transactions" in the limited sense defined in Section 1 with reference to foreign commerce as distinguished from any subject-matter of which a court of admiralty would have jurisdiction under the Judicial Code in the terms of Section 4 or which, apart from the arbitration agreement, would be justiciable in admiralty in the terms of Section 8.

The suggested construction seems conformable to the explanations of the Act given at the time of its passage, for the House report (No. 96, 68th Congress, 1st session), said:

> "The purpose of this bill is to make valid and enforcible agreements for arbitration contained in con-

tracts involving interstate commerce or within the jurisdiction of admiralty, or which may be the subject of litigation in Federal courts."

See also The Congressional Record of February 4, 1925 (Vol. 66, part 3, p. 3004, *i. e.*, 68th Congress, 2d session, Jan. 20-Feb. 7, 1925).

POINT VII.

Decree, with direction for issuance of execution, was properly entered against the petitioner and its stipulator.

Henry on the Jurisdiction and Procedure of the Admiralty Courts of the United States says (pp. 343, 344):

> "The stipulator is a surety for the claimant, who by entering into the bond becomes individually liable in that cause of action in which he makes claim. Such personal liability does not necessarily arise from the actual ownership by the claimant of the vessel which incurs a maritime lien, as where the whole vessel is chartered to another who sails and provides the funds, or to the master who sails the vessel on shares. The claimant may be master, owner or a foreign consul and the stipulators are the sureties of the claimant who becomes a principal by entering into the stipulation. * * *
>
> The act of 1847 (Rev. Stat. §941), permitting a bond with sureties to be taken by the marshal, provides that the court may enter a decree, and award execution at the same time against the principal and his sureties on the bond given for the release. The same power exists as to stipulation taken by

> the court on the release of the vessel to the claimant."

As stated by the Circuit Court of Appeals for the Ninth Circuit in *Perriam* v. *Pacific Coast Co.*, 133 Fed. 140, near top page 144:

> "This has always been held to mean that the entry of judgment against the stipulators is a matter of course, and that the stipulators have rendered themselves subject to such entry of judgment by the bare fact that they have so stipulated."

The petitioner's statement that "the principal of the stipulator was the tug 'Fagan'" (petitioner's brief, p. 27) is opposed to the very nature of the stipulation as a release of the tug and the substitution of the obligation of the stipulation therefor.

The libel was maintainable in rem and the stipulation was given as a substitute for the vessel so that the stipulation was liable to the exercise of every authority on the part of the court which it could properly exercise if the thing itself was still in the custody of the court.

The Wanata, 95 U. S. 600 at page 611;
The Palmyra, 12 Wheat. (25 U. S.) 1.

Stipulations are to be interpreted as to the extent and limitation of responsibility created by them by the intention of the court which required them, and not by the intention of the parties who are bound by them.

The Beaconsfield, 158 U. S. 303, top page 311.

As the Circuit Court of Appeals for the Fourth Circuit said in *The Glide,* 72 Fed. 200, 202, 203:

> "In other words, the sureties, in great measure, stand in the position of bail to the action. They are not parties to the cause. They are represented by the claimant; they covenant to pay such decree as may be made against him; and the decree against him binds them."

As the Circuit Court of Appeals for the Sixth Circuit said in *The New York,* 104 Fed. 561, 564, in opinion by Judge, later Justice, LURTON:

> "Such a bond is not a mere personal security given to the plaintiff, but a security given to the court. It is 'a pledge or substitute for the property proceeded against' * * *."

The case of *Atlantic Mut. Ins. Co.* v. *Alexandre,* 16 Fed. 279, ADDISON BROWN, D. J., the petitioner's sole citation on this point, is not authority for the petitioner but against it. In that case a former action *in rem* was held not to be technically a bar against a subsequent proceeding *in personam* where the stipulation in the former cause was signed by only one of several claimants made respondents in the second suit. The other claimants did not, in their character as such merely, become personally responsible for the decree *in rem,* not having signed the stipulation. In the case at bar the sole claimant of the tug "Gerald A. Fagan" did sign the stipulation and the language of Judge BROWN (p. 281) in reference to the distinction is fatal to the petitioner's argument, for Judge BROWN said:

> "In the present case the claimants in the former suit are identical with the respondents in the latter, and if all the claimants in the suit *in rem* had executed the stipulation for the whole amount of the

demand, the remedies available in the former action would thence forward seem to be coextensive with any obtainable in an action *in personam;* * * *."

The stipulator's agreement is wholly misconceived in the statement appearing on page 28 of the petitioner's brief: "It agreed to pay only in the event of a final decree against the tug 'Fagan' and there has been none." The agreement of the stipulator as expressed in the stipulation for value was not that if a decree were rendered primarily against the tug the stipulator should be secondarily liable but on the contrary the stipulation recited (R. 25 A): "the parties hereto consenting and agreeing that if the libelant recover, the decree may be entered against them and each of them", etc. That is precisely the character of the decree entered. The decree, therefore, conforms to the stipulation itself, which further provides (R. bottom 25 A, top 25 B): "that thereupon execution therefor may issue against their and each of their goods, chattels, lands and tenements or other real estate."

The petitioner's argument seems to be directed to a case that does not exist upon this record. By the express terms of the stipulation the signatories thereto—the petitioner and its stipulator—assumed a direct personal obligation, not a secondary liability upon the default of another. Instead of conforming its argument to the facts, the petitioner has twisted the facts around a theory and then charges the Circuit Court of Appeals with "a misapprehension of the facts of the case" (petitioner's brief, p. 28), and with remaining in error after the removal of such misapprehension at a conference with MANTON, C. J. (p. 28). The Circuit Court of Appeals was under no misapprehension of facts but upon that assertion by the petitioner's advocate Judge MANTON heard him and the advocate for the libelants (here re-

spondents) and wrote the letter quoted on page 6 of the petitioner's brief. It is preposterous to suppose that the judges of the Circuit Court of Appeals—two of whom sat for years in the District Court—were under any misapprehension as to the facts of this case or as to the form of the stipulation and customary practice in respect to decrees on such stipulations.

Admiralty Rule 8 of the Rules of the District Court for the Southern District of New York, quoted by Judge MANTON (R. 246), prescribes the form of the stipulation—a form which does away with the former requirement of motion for summary judgment against stipulators—and provides in part:

> "Such stipulation shall contain the consent of the stipulators, that if the libellant or petitioner recover, the decree may be entered against them for an amount not exceeding the amount named in such stipulation and that thereupon execution may issue against their goods, chattels, lands, and tenements or other real estate."

The stipulation in the case at bar is in that form (R. 25 A, 25 B). The form of decree cited by opposing counsel in Benedict on Admiralty was entitled in the Eastern District of New York and, as indicated by the footnote thereto, was not entered upon the Southern District form of stipulation.

As far back as 1834 in *The Virgin*, 8 Pet. (33 U. S.) 537, at page 555, we find a form of decree against claimant and stipulators as follows:

> "And this court, further proceeding to render such decree as the circuit court ought to have rendered in the premises, it is further ordered, adjudged and decreed, that the said claimant, Graf,

do forthwith pay into the said circuit court the sum of $1,800, being the amount of the appraised value of the said ship 'Virgin', delivered to him on stipulation, as in the proceedings mentioned, together with interest thereon, at the rate of six per cent, from the 24th day of March, 1824, when the same was delivered to him on stipulation as aforesaid, unto the day when the same sum shall be so paid into the circuit court, together with the costs of the district and circuit courts; and unless he shall do so, within ten days after the said circuit court shall require the same to be done, that execution do issue, in due form of law, upon the stipulation aforesaid, against all the parties thereto. And upon the payment of such sums, then that the claimants, as owners of the said ship 'Virgin', be and hereby are forever exonerated from all other and further payment in the premises. And it is further ordered, adjudged and decreed, that this cause be remanded to the said circuit court, with directions to carry this decree forthwith into effect."

Very appropriate to the case at bar is the language of Judge BENEDICT in *Harriman* v. *The Rockaway Beach Pier Co.*, 8 Fed. 94, bottom page 95:

"This stipulation was without qualification. It was given voluntarily, and not in obedience to any order of the court. It was not necessary to the defense of the cause, nor in any way compelled. By virtue of this stipulation the defendant acquired possession of property then in the possession of the marshal. Under such circumstances, I do not see how it can be open to the stipulators upon that stipulation to say that the court has not acquired jurisdiction to enter a decree upon the stipulation."

Section 8 of the Act, unless it contemplated a nugatory thing, must have intended that a proceeding which begins with the seizure of the property and in which the court retains jurisdiction to enter a decree should end with a decree against the property or against those liable upon the stipulation substituted for the property. Such has been the course of proceedings in the case at bar and the proceeding was ripe for decree, for everything contemplated by Section 8 as precedent to decree had been accomplished.

The filing of the stipulation was the undertaking of a personal liability to which the decree gave effect. The arbitration, which intervened between the stipulation and decree, was a procedural step in the ascertainment of the liability, not a qualification or modification upon that liability. As the arbitration clause was made part of the booking contract, the order, as resettled, directing that such arbitration proceed, referred to the subject-matter of the arbitration as "any and all issues under the contract" etc. (R. 29). The evidence presented on the arbitration related to the performance of the contract and whether such contract was well performed or not turned on the question of the tug's negligence in such performance. In confirming the award and entering a decree, the court reached the judicial conclusion that, in the language of the Circuit Court of Appeals (R. 246): "the liability arbitrated between the parties was a liability that attached to the tug as well as to the owner *in personam.*"

The petitioner's suggestion (petitioner's brief bottom p. 28, top p. 29) that the Circuit Court of Appeals has construed Section 8 of the Act as giving the courts "power to order arbitration in any case *in rem* in admiralty whether any agreement for arbitration exists or not" is a grotesque caricature of the decision below and, if necessary to the petitioner's argument, sufficiently demonstrates how unsound that argument is.

POINT VIII.

The objection that the award was not signed by all the arbitrators is insubstantial, was not taken in the District Court and was not assigned as error.

The Act of Congress is a validating statute rendering arbitration agreements enforceable and makes no distinction between agreements requiring unanimity on the part of the arbitrators and agreements not requiring it. The Act contains no provision requiring unanimity where, as here, the arbitration agreement does not require it. The petitioner's suggestion that there is some sort of presumption that the Act contemplated unanimity of action on the part of the arbitrators is not recognizable in the provisions made for majority action in the procedure authorized by Section 7 of the Act in respect to witnesses. Under that section "the arbitrators * * * or a majority of them, may summon in writing any person to attend" etc. "Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them," and in case of refusal to obey the summons "the United States Court in and for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons" etc. Since, therefore, the arbitrators may proceed by majority action in compelling the attendance of witnesses, it is hardly reasonable to suppose that they may not make their decision by majority action.

The statement in the petitioner's brief (p. 29) that "the Arbitration Act of the State of New York, which we understand was largely followed in the preparation of the Federal Act, does contain a provision that a majority of the arbitrators may make an award" is somewhat misleading as the provision mentioned does not appear (except by cross-reference) in the Arbitration Law, Chapter 72 of the Consolidated Laws of the State of New

York, but is to be found in Section 1453 of the Civil Practice Act whereby "an award by a majority of them is valid unless the concurrence of all is expressly required in the submission". That clause appeared in the same terms in Section 2371 of the old Code of Civil Procedure which in turn derived it, without change of wording, from the now more than one hundred years old Revised Statutes of the State of New York, Part III, Title XIV, "Of Arbitrations", Section 7, which appears at the top of page 542 of the second volume of the first edition (The Revised Statutes of New York dealt with submission of existing disputes to arbitration, a judgment of a designated court to be rendered on the award, as distinguished from agreements to arbitrate future controversies). There is only a partial correspondence between the Federal and the New York Statutes and no room for the suggestion of a variance to be explained, amid close correspondences, only by a difference of intent in giving judicial enforceability to agreements. For the arbitration of future controversies in interstate or foreign commerce or in matters within the admiralty jurisdiction Congress was not (like the Revised Statutes of New York in making provision for the enforcement of awards on the actual submission of preexisting controversies) codifying, with variances required to be expressed, an existing procedure but was striking out on a new line. Its legislation is self-sufficient and unimpeded by any common law disabilities. The true principle is that restrictions upon its legislation, not appearing therein, were not intended thereby.

The arbitration was to take place before the Grain Committee of the New York Produce Exchange and the Committee made its award, signed by four of its five members. It is common knowledge that committees act by a majority vote. The objection now urged was not taken in the affidavits in opposition to the motion to confirm the award (R. 175-183) when, if taken, that objec-

tion could have been met by evidence of the rules under which the Committee acts. The objection, if it had any substance, was, therefore, waived.

As the New York Court of Appeals said in *Matter of S. A. Wenger & Co., Inc.* v. *Propper Silk Hosiery Mills, Inc.*, 239 N. Y. 199, 202:

> "The contract provides: 'Sales governed by Raw Silk Rules & Regulations of the Silk Association of America.' The record does not set forth the rules. They are, however, a part of the contract. They confer rights upon both parties."

Furthermore, neither the original nor the additional assignments of error (R. 229-234) made the point so that it is not matter for consideration in review of the decision below.

CONCLUSION.

The decision of the Circuit Court of Appeals affirming the decretal order of the District Court should be affirmed by this Court.

Respectfully submitted,

OTTO & LYON,
Proctors for Respondents,
By GEORGE V. A. MCCLOSKEY,
Counsel.

APPENDIX

The United States Arbitration Act, 43 Stat. at L. 883.

CHAP. 213.—An Act to make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That "maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Sec. 2. That a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an

existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Sec. 3. That if any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Sec. 4. That a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for the service of summons in the jurisdiction in which the proceeding is brought. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement: *Provided,* That the hearing and proceedings under such agreement shall be within the dis-

trict in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Sec. 5. That if in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and

effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

Sec. 6. That any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

Sec. 7. That the arbitrators selected either as prescribed in this Act or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States court in and for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner now provided for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

Sec. 8. That if the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding here-

under by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

Sec. 9. If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in the next two sections. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a non-resident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

Sec. 10. That in either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Sec. 11. That in either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

Sec. 12. That notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a non-resident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

Sec. 13. That the party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

Sec. 14. That this Act may be referred to as "The United States Arbitration Act."

Sec. 15. That all Acts and parts of Acts inconsistent with this Act are hereby repealed, and this Act shall take effect on and after the 1st day of January next after its enactment, but shall not apply to contracts made prior to the taking effect of this Act.

Approved, February 12, 1925.

FILE COPY

DEC

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 172.

MARINE TRANSIT CORPORATION and TUG "GERALD A. FAGAN" by MARINE TRANSIT CORPORATION,

Petitioner,

against

LOUIS LOUIS DREYFUS and CHARLES DREYFUS, etc.

MOTION OF THE CHAMBER OF COMMERCE OF THE STATE OF NEW YORK AND THE AMERICAN ARBITRATION ASSOCIATION, INC., FOR LEAVE TO FILE BRIEF AS AMICI CURIAE, AND BRIEF OF AMICI CURIAE.

JULIUS HENRY COHEN,
KENNETH DAYTON,
Counsel for the Chamber of Commerce of the State of New York and the American Arbitration Association, Inc., *amici curiae.*

The Hecla Press, 225 Varick St., N. Y. Tel. WAlker 5-1480.

TABLE OF CONTENTS.

	PAGE
NOTICE OF MOTION	1
PETITION FOR LEAVE TO INTERVENE AS AMICI CURIAE	2
BRIEF FOR AMICI CURIAE	7
Preliminary Statement	7
The Facts	8
The History of the United States Arbitration Act	9
POINT I—The United States Arbitration Act is constitutional	11
POINT II—The United States Arbitration Act is applicable to this case	20
POINT III—Section 8 of the act authorizes arbitration as part of a suit in admiralty, and authorizes the admiralty court to enter its decree upon the award without reference to the provisions of Section 9	30
POINT IV—An award by a majority of the arbitrators is sufficient	34
CONCLUSION—The decree of the lower court, upholding the validity of the award in this case, should be affirmed	37

TABLE OF CASES CITED.

	PAGE
Burchell v. Marsh, 17 How. 344	14
Burrell v. United States, 147 Fed. 44	14
Danielsen v. Entre Rios Rys. Co., 22 Fed. (2nd) 326.	32
The Fredensbro, 18 Fed. (2nd) 983, 985	32
The Gansfjord, 25 Fed. (2nd) 736, aff'd 32 Fed. (2nd) 236	17
Hamilton v. Home Insurance Co., 137 U. S. 370, 385-386	14
Hannevig v. Sutherland & Co., 256 Fed. 445	14
Hastings v. Jones, 18 Fed. (2nd) 833	14
Hecker v. Fowler, 2 Wall. 123	14
Houseman v. The North Carolina, 15 Pet. 40, 45	14
The Lottawanna, 21 Wall. 558	17, 18
Matter of Berkovitz v. Arbib and Houlberg, 230 N. Y. 261, 274	12
Matter of Bullard v. Grace Co., 240 N. Y. 388	19
Matter of Finsilver, Still & Moss v. Goldberg, Mass & Co., 253 N. Y. 382	19
Newcomb v. Wood, 97 U. S. 581, 583	14
New York & Cumberland R. R. Co. v. Myers, 18 How. 246	14
The Propeller Genesee Chief v. Fitzhugh, 12 How. 460	17
Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109	13, 14

PAGE

Southern Pacific Co. v. Jaensen, 244 U. S. 205, 215... 17
Stoffel v. W. J. McCahan Sugar Refining & Molasses Co., 35 Fed. (2nd) 602, aff'd 41 Fed. (2nd) 651.... 17

Tobey v. Bristol County, 3 Story 800, 819-826..... 14

U. S. Asphalt R. Co. v. Trinidad L. P. Co., 222 Fed. 1006 14
The Volsinio, 32 Fed. (2nd) 357, 358; aff'd 36 Fed. (2nd) 773..... 32

Westall v. Avery, 171 Fed. 626..... 14
Woerner, In re, 31 Fed. (2nd) 283, 284..... 24
White Eagle Laundry Co. v. Slawek, 296 Ill. 240..... 12

Zip Mfg. Co. v. Pep Mfg. Co., 44 Fed. (2nd) 184....20, 24

STATUTES, ETC., CITED.

Arbitration Act, Sections 8, 9, 10.....15, 16, 30, 31, 32
New York Constitution, Article VI, Section 1..... 12
United States Constitution, Article III..... 13
House Committee on Judiciary (Report No. 96, 68th Congress, First Session)..... 27
Judicial Code, Section 24 (U. S. Code, Title 28, Sec. 21), subds. (1) and (8)..... 22
Report of American Bar Association, Vol. 49, 1924, pages 283-284..... 29
Commercial Arbitration and the Law (Cohen)..... 14

NOTICE OF MOTION.

Supreme Court of the United States

OCTOBER TERM, 1931.

MARINE TRANSIT CORPORATION and TUG "GERALD A. FAGAN" by MARINE TRANSIT CORPORATION,

Petitioner,

against

LOUIS LOUIS DREYFUS and CHARLES DREYFUS, etc.

No. 172.

Sirs:

PLEASE TAKE NOTICE that upon the annexed petition and brief we shall apply to the Supreme Court of the United States, at Washington, D. C., on the 7th day of December, 1931, at the opening of the court on that day, or as soon thereafter as counsel may be heard, for permission to the Chamber of Commerce of the State of New York and the American Arbitration Association, Inc., to intervene herein as *amici curiae* and to file the accompanying brief.

Dated, November 24, 1931.

Yours, etc.,

JULIUS HENRY COHEN,
KENNETH DAYTON,
Counsel for the Chamber of Commerce of the State of New York and the American Arbitration Association, Inc.,

74 Trinity Place,
New York City.

To:

HORACE L. CHENEY, Esq.,
Counsel for Petitioner, Marine Transit Corp.

GEORGE V. A. MCCLOSKEY, Esq.,
Counsel for Louis Louis Dreyfus, et al.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1931.

MARINE TRANSIT CORPORATION and TUG "GERALD A. FAGAN" by MARINE TRANSIT CORPORATION, Petitioner, against LOUIS LOUIS DREYFUS and CHARLES DREYFUS, etc.	No. 172.

PETITION FOR LEAVE TO INTERVENE AS *AMICI CURIAE.*

To the Supreme Court of the United States:

The petition of the Chamber of Commerce of the State of New York and the American Arbitration Association, Inc., respectfully shows to the court:

1. Your petitioner, the Chamber of Commerce of the State of New York, is the oldest commercial or trade body in the United States. Its charter was granted by George III on April 5th, 1768, and was confirmed by one of the first statutes passed by the Legislature of the State of New York, Chapter 30, Laws of 1784. From its incorporation, the Chamber has been an active proponent of the arbitration of commercial disputes and has furnished a

tribunal for the service of the commercial world, including a Court of Arbitration, authorized by the Legislature by Chapter 278 of the Laws of 1874, Chapter 495 of the Laws of 1875.

2. Believing that so long as the common law rules of revocability and against ouster of the jurisdiction of the courts persisted, no satisfactory system of arbitration could be had, the Chamber took steps some sixteen years ago to correct these rules. It caused a study thereof to be made by its counsel, Julius Henry Cohen, which was published under the title "Commercial Arbitration and the Law," and which showed the sources of these rules, their error, and their correction by judicial decision in England, where they had originated. It undertook a campaign for the correction of the law in New York, and in co-operation with a committee of the New York State Bar Association, caused the statute to be drafted which became the New York Arbitration Law, Chapter 275 of the Laws of 1920. It co-operated with the New Jersey State Chamber of Commerce and the New Jersey State Bar Association Committee in the preparation of the New Jersey statute, which was adopted in 1923 (Laws of New Jersey, 1923, Chapter 134). It induced the Committee on Commerce, Trade and Commercial Law of the American Bar Association to undertake the preparation and support of a United States statute and of a uniform state act, and also of treaties to be made between the United States and foreign countries, for the effectuation of arbitration agreements and awards. All of these statutes and treaties were to be substantially similar in principle and form, so that a uniform modern system of arbitration should be made possible. The Chamber organized commercial sentiment throughout the United States in support of the United States Act, more than one hundred and thirty-five commercial organizations giving it their endorsement.

During all these years the Chamber was an active advocate of arbitration, giving advice and assistance to other

commercial organizations who were interested in the subject, advising upon statutes in other states (such as those in Massachusetts and Oregon), entering into reciprocal agreements with chambers of commerce abroad (for example, Buenos Aires, Amsterdam and a number of English chambers), and establishing a reputation of competence in its tribunal which brought to it a great number of international disputes arising out of the war and the depression which followed, including disputes to which foreign governments were parties. In order that the work might be continued on a national scale, it caused the Arbitration Foundation, Inc., to be organized as a membership corporation for that purpose.

3. Your petitioner, the American Arbitration Association, Inc., is a membership corporation of the State of New York, formed in January, 1926, by the consolidation of The Arbitration Society of America, Inc., The Arbitration Conference and The Arbitration Foundation, Inc., above mentioned, all of which were organizations with memberships representative of national commercial interests. Its purpose is the development of a sound system of arbitration throughout the United States and with foreign countries. Since its organization, it has maintained and operated a tribunal in New York for the arbitration of disputes before which are brought a very large number of cases annually, has studied the problems of a large number of trade associations and has advised upon the installation of systems of arbitration, and has organized a national panel of arbitrators, exceeding seven thousand in number and located in more than seventeen hundred cities and towns in the United States, the services of which are available for arbitration by any party. As a part of its work, and furthering the scheme initiated by the Chamber, it has drafted an arbitration statute which it recommends for adoption by the various states. This statute incorporates the principles of the United States and New York acts, but has been improved in the light of growing experience in the practice of arbitration. The

Association gives aid and advice to commercial organizations in various states which wish to secure the adoption of this act, and this statute with slight modifications has been enacted in the following states: Oregon (1925, 1929, 1931), California (1927), Pennsylvania (1927), Louisiana (1928), Connecticut (1929), Rhode Island (1929), New Hampshire (1929), Ohio (1931), Wisconsin (1931).

4. All of the acts mentioned above are parts of a general scheme for the development of arbitration, and it was the purpose of their sponsors to foster a uniform system of arbitration throughout the United States. Accordingly, the problems of the constitutionality, construction and application of the individual acts are of national importance because of the bearing which they have on this national scheme. Since the adoption of the first of the modern statutes in New York, in 1920, the use of arbitration has enjoyed a tremendous growth, and it has been adopted as a system for the settlement of disputes by a great number of trade associations and chambers of commerce, many of which have been assisted and advised in the installation of such systems by your petitioners. The construction and application of the United States Act is of special importance, both for the effect which it may have upon the construction and application of state acts with similar principles and provisions, and because it is the statute to which reference will usually be made when the arbitrations involve controversies between citizens of different states. The interest of the commercial world throughout the United States in the proper construction of the statute is far superior to the interests of any individual litigants in the outcome of a particular proceeding.

Because they have been the sponsors of the modern statutes mentioned above, and have taken the lead in the development of arbitration, your petitioners are vitally concerned in the sound and uniform construction and application of these statutes, and have frequently been granted leave to intervene as *amici curiae,* either separately or jointly, in proceedings which have involved ques-

tions of constitutionality or important questions of construction. By reason of their position in respect to arbitration, your petitioners are generally regarded as the representatives of the commercial world in this field.

5. It is hardly necessary to emphasize the importance of the present case in respect to the usefulness of the United States statute in the general scheme outlined above. The constitutionality of the statute is attacked, and if it is held to be constitutional, then the claim is made that the statute should be so construed as to exclude a very large class of cases which your petitioners believe it was intended to cover. Important questions of construction in respect to procedure are also raised. A decision reversing the Circuit Court of Appeals upon these points would be of the most serious consequence to the continued use of arbitration on a national scale.

6. Your petitioners have no interest in the outcome of the case as between the parties thereto, and have not attempted to present argument upon any point which affects the disposition of this case alone and is not of general importance and interest.

WHEREFORE, your petitioners respectfully request that their petition for leave to intervene in this case and to file the enclosed brief as *amici curiae* be granted.

Dated, November 24, 1931.

Respectfully submitted,

CHAMBER OF COMMERCE OF THE STATE OF NEW YORK and AMERICAN ARBITRATION ASSOCIATION, INC.,

By JULIUS HENRY COHEN,
KENNETH DAYTON,
Counsel.

Supreme Court of the United States

OCTOBER TERM, 1931.

MARINE TRANSIT CORPORATION and TUG "GERALD A. FAGAN" by MARINE TRANSIT CORPORATION,

Petitioner,

against

LOUIS LOUIS DREYFUS and CHARLES DREYFUS, etc.

No. 172.

BRIEF FOR THE CHAMBER OF COMMERCE OF THE STATE OF NEW YORK AND THE AMERICAN ARBITRATION ASSOCIATION, INC., *AMICI CURIAE.*

Preliminary Statement.

The interest in this case of the Chamber of Commerce of the State of New York and the American Arbitration Association, Inc., as sponsors of the various arbitration statutes and proponents of the development of a sound system of arbitration throughout the United States and with foreign countries, has been sufficiently set forth in the petition. The importance to the cause of arbitration of the questions involved in this case, attacking the constitutionality of the United States statute and seeking to construe it in a very limited manner, have been suggested in the petition and will appear fully from the discussion of the law which follows.

The Facts.

The facts in the case have been sufficiently set forth in the briefs submitted by the parties so that they need not be discussed in detail here. In substance, a shipment of grain was routed from Ft. William, Ont., for export, via Buffalo and New York. The Marine Transit Corporation undertook to haul it from Buffalo to New York, under an agreement which incorporated the terms of the New York Produce Exchange Canal Grain Charter Party No. 1 (pp. 147-148). This Charter Party No. 1 contained a provision for arbitration before the Committee on Grain of the New York Produce Exchange (p. 156). The bill of lading shows that the grain was shipped from Ft. William, Ontario, "in bond for export" (p. 164).

The Barge "John E. Enright," which carried part of the grain, was sunk while under tow of the Tug "Gerald A. Fagan," owned and operated by the Marine Transit Corporation. The shippers commenced a proceeding in admiralty against the Marine Transit Corporation, the tug and the barge, and subsequently claimed arbitration under Charter Party No. 1. Application for arbitration was granted by the District Court as between the shipper and the Marine Transit Corporation, pursuant to the terms of the contract (p. 28).

While the minutes of the hearings before the Grain Committee of the Produce Exchange are printed at length in the record (pp. 30-146), they are apparently of no importance on the present appeal.

An award was rendered in December, 1929, signed by four out of five members of the Grain Committee, and awarding $23,016 principal, $1,668.66 interest, and $362.50 costs of the arbitration in favor of Dreyfus and against the Marine Transit Corporation (p. 166).

Thereafter, on motion made by Dreyfus, the award was confirmed by the District Court (pp. 211-215).

Subsequently the question of the shipper's right to recover from the claimant or its stipulators on behalf of the Tug "Fagan" was separately considered, and the District Court permitted such recovery (pp. 216-226).

Both decisions were affirmed by the Circuit Court of Appeals, Second Circuit (p. 247).

The petitioner attacks the constitutionality of the United States statute, its construction in respect to confirmation under Sections 8 and 9, its application to this case, the issuance of execution against the stipulator for the tug, and the validity of an award signed only by four of the five arbitrators (petitioner's brief, pp. 6-7).

The History of the United States Arbitration Act.

A brief statement of the history of the United States statute will serve to explain many of the questions which arise in connection with its constitutionality and its construction, and will save repetition in the subsequent discussion of the law.

As we said in the petition annexed hereto, the United States Act was a part of a general scheme initiated by the Chamber of Commerce for the development of commercial arbitration on a national and international scale, and involving the adoption of substantially uniform acts among the various jurisdictions in this country, and treaties with foreign nations.

The New York act was drafted by a committee of the New York State Bar Association at the request of the Chamber of Commerce. The New Jersey State Chamber of Commerce was interested in a New Jersey act, and in co-operation with the New Jersey State Bar Association, drafted an act with provisions borrowed from the New York statute. Then the Chamber of Commerce induced the Committee on Commerce, Trade and Commercial Law of the American Bar Association to draft a proposed United States Act and a proposed uniform act for

adoption by the states. These were based on the provisions of the New York and New Jersey acts.

Successive drafts of the proposed federal act were submitted by the Committee on Commerce, Trade and Commercial Law to the American Bar Association and approved by the Association in 1921 (46 Reports of American Bar Association, 1921, pp. 54, 311, 359) and 1922 (47 Reports of the American Bar Association, 1922 (pp. 53, 315). By authority of the Association, the bill was introduced in Congress in December, 1922 (S. 4214, H. R. 13522). It was not reported out of committee at that session, but certain amendments, not material here, were proposed and they were approved by the Association in 1923 (48 Reports of the American Bar Association, 1923, pp. 60, 302).

The bill was reintroduced in Congress in December, 1923 (S. 1005, H. R. 646). Hearings were held on January 9, 1924, by sub-committees of the House and Senate Committees on the Judiciary. The minutes of these hearings were printed by the government printing office for the use of the Committee on the Judiciary. The pamphlet carries no print number, but is entitled "Joint Hearings before the Subcommittees on the Judiciary, Congress of the United States, 68th Congress, First Session, S. 1005 and H. R. 646 * * * January 9th, 1924."

The bill as introduced was reported favorably by the House Committee (Report No. 96, 68th Congress, First Session) and was passed by the House in that form. Later the Senate Committee made certain amendments to which we shall have occasion to refer in our discussion of the law, and the bill was passed by the Senate and repassed by the House in this amended form. The bill, as passed by the House and showing the amendments made in the Senate, is printed in 68 Annual Reports of the Chamber of Commerce of the State of New York, 1925-1926, page 21.

Too great emphasis cannot be placed on the fact that the New York, New Jersey and United States acts were all drafted and passed on the demand of commercial organizations. More than one hundred and thirty-five trade

associations throughout the United States supported the United States Act, and their demand for its passage was sufficient to secure unanimous consent to consideration by the Senate. Subsequent statutes, based on the draft act prepared by the American Arbitration Association, modelled on the United States and the New Jersey acts, but containing improvements in form and the omission of certain technicalities to be found in those acts, have been adopted in a dozen additional states listed in paragraph 3 of the accompanying petition, all upon the demand of commercial organizations in the respective states.

The importance of this commercial support for the bills lies in the fact that it clearly evidences the fundamental underlying purposes of the statutes, in the light of which their detailed provisions must be construed. There can be no question that the legislative adoption of these statutes was intended to effectuate the wishes of their commercial sponsors. What the world of commerce wanted was a practical and effective instrumentality for the enforcement of arbitration agreements without regard to technicalities. They wanted a system which would work, and work efficiently. The statutes should be construed in the most liberal sense to effectuate this purpose, because they are remedial in nature.

POINT I.

The United States Arbitration Act is constitutional.

The Marine Transit Corporation attacks the constitutionality of the United States Act from three angles:

(1) As depriving the Federal courts of their judicial power,

(2) As conferring that judicial power upon laymen, and

(3) As enlarging the jurisdiction of the admiralty courts by conferring upon them the equitable power of specific performance.

The first two points have already been considered and disallowed by the highest courts in New York and Illinois in respect to the state arbitration statutes.

Matter of Berkovitz v. *Arbib and Houlberg,* 230 N. Y. 261, 274.

White Eagle Laundry Co. v. *Slawek,* 296 Ill. 240.

Although the state constitutional provisions under consideration are different than those of the federal constitution, we think that the principles involved are identical and that the decisions are persuasive. Under the New York Constitution, Article VI, Section 1, the Supreme Court is continued "with general jurisdiction in law and equity," and it was argued that the New York Act abridged this general jurisdiction. The New York court denied the validity of this argument and said in part:

> "Jurisdiction exists that rights may be maintained. Rights are not maintained that jurisdiction may exist. The People, in establishing a Supreme Court to administer the law, did not petrify the law which the court is to administer * * *. The Supreme Court does not lose a power inherent in its very being when it loses power to give aid in the repudiation of a contract, concluded without fraud or error, whereby differences are to be settled without resort to litigation. For the right to nullify is substituted the duty to enforce."

It then points out that the courts are still open to determine whether there is an agreement for arbitration and, if so, and after an award is rendered, to exercise jurisdiction to give whatever relief may be proper.

> "The situation is the same in substance as when effect is given to a release or to a covenant not to sue. Jurisdiction is not renounced, but the time and manner of its exercise are adapted to the convention of the parties restricting the media of proof. Long before the statute there was a like withholding of relief whenever the subject-matter of arbitration, instead of extending to all differences, was limited to some."

* * * * * * *

> "We are now asked to declare it [the common law rule] so imbedded in the very foundation of our jurisprudence and the structure of our courts that nothing less than an amendment of the Constitution is competent to change it. We will not go so far. The judges might have changed the rule themselves if they had abandoned some early precedents, as at times they seemed inclined to do. They might have whittled it down to nothing, as was done indeed in England, by distinctions between promises that are collateral and those that are conditions * * *. No one would have suspected that in so doing they were undermining a jurisdiction which the Constitution had charged them with a duty to preserve. Not different is the effect of like changes when wrought by legislation." * * *

So in the Illinois case it was argued that the statute conferred judicial powers on individuals, and the court pointed out that the jurisdiction of the arbitrators flowed wholly from the voluntary agreement of the parties, and not from the statute at all. The statute conferred no new power, and took away no inalienable right, but simply recognized and enforced the agreement of the parties. It provided a procedural method for carrying out their contract, and nothing more.

We think that the decision of this court in *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, although it was concerned solely with a proceeding under the New York law, has a very direct bearing on the present argument. The elaborate review of authority in the majority opinion in that case recognizes the entire validity of arbitration agreements even prior to the statute, the fact that the only difficulty in their practical effectuation was a procedural one, and that these arbitration acts are procedural statutes, going solely to the remedy and not affecting substantive right. It recognizes the long-established rule, that under many circumstances arbitration agreements were enforceable by the courts, even without a statute. Thus it has always been the law that when the issues in a pending litigation were submitted to arbitration under a rule

of court, the parties were bound. There are innumerable cases to be found in the decisions in the United States courts where pending issues have been referred to arbitrators by agreement of the parties, and the federal courts have recognized the binding effect of the submission. See cases cited in *Red Cross* opinion, page 122, and

Newcomb v. *Wood,* 97 U. S. 581, 583.
Hecker v. *Fowler,* 2 Wall. 123.
Houseman v. *The North Carolina,* 15 Pet. 40, 45.
Burrell v. *U. S.,* 147 Fed. 44.
Westall v. *Avery,* 171 Fed. 626.
Hannevig v. *Sutherland & Co.,* 256 Fed. 445.
Hastings v. *Jones,* 18 Fed. (2nd) 833.
New York & Cumberland R. R. Co. v. *Myers,* 18 How. 246.
Burchell v. *Marsh,* 17 How. 344.

It is to be borne in mind that even executory agreements for arbitration were not invalid at common law, even though they were loosely said to be "void." The agreement was always as valid as any other term of a contract; the courts, for reasons of supposed public policy, denied enforcement, but an action would lie for damages for breach.

Tobey v. *Bristol County,* 3 Story 800, 819-826.
Hamilton v. *Home Insurance Co.,* 137 U. S. 370, 385-386.

The rule against enforcement found its origin in a dictum in an old English case, which itself is demonstrably unsound (see study in Cohen, *"Commercial Arbitration and the Law"*). The rule has been the subject of trenchant criticism by many judges. See comprehensive review in *U. S. Asphalt R. Co.* v. *Trinidad L. P. Co.,* 222 Fed. 1006.

The Arbitration Act is purely procedural in its nature. Article III of the Constitution vests the judicial power of the United States in the Supreme Court and such inferior courts as Congress may establish, and it need hardly be argued at this late day that Congress has plenary au-

thority over the procedure of those inferior courts. The statute declares (Sec. 2) that an agreement is valid, but this particular declaration is surplusage, because the agreement always was valid. The declaration creates no new substantive right. Beyond that, the statute merely provides a new and effective means for enforcing the agreement. In Section 3, it provides for the stay of actions brought in the federal courts in defiance of an arbitration agreement. Section 4 provides a summary procedure by which the court may decide whether or not an effective and binding arbitration agreement has been made. Section 5 provides for the appointment of an arbitrator by the court where the means agreed upon by the parties has failed to function or where they made no agreement as to the method of selection. Later sections empower the arbitrators to bring witnesses before them, and provide summary methods for enforcing, vacating, modifying or correcting the award and entering judgment thereon. Section 8 provides for the application of the other provisions in the act after an ordinary admiralty proceeding has been commenced.

The petitioner's contention that the act deprives the District courts of power to determine the merits of causes, that they are made merely ministerial officers to give effect to the award of a non-judicial body, that the only power given to a court is to set the award aside for fraud under Section 10, and that an admiralty court cannot set it aside for any reason under Section 8, are all unfounded. If the courts lose power to determine the merits of the case, it is because of the agreement of the parties, and not of the statute—just as they lost power when there was a submission by parties to a pending litigation. The power of the court is not limited to setting aside the award, but it extends to determine whether there was a valid agreement for arbitration, and whether there has been a default under it, and whether the parties are bound to arbitrate. The duty of the courts in passing upon an award is not ministerial, but is judicial in the fullest sense—Section 10 codifies and extends the well-established

common law which limit judicial review of the arbitration proceedings and the award to fundamental denials of justice. While the entry of a decree of an admiralty court under Section 8 is procedurally different from the motion to confirm under Section 9, it is perfectly obvious that the decree is not to be entered if grounds exist for vacating the award under Section 10.

The statute does not impair, but on the contrary makes more effective, the jurisdiction of the courts. It gives a party his day in court as to the existence of an arbitration agreement, his performance thereunder, and the propriety of the award.

The Constitution was never intended to and has never been construed to solidify the procedure which existed in 1789. Indeed, it did not even solidify substantive rights. The courts exist as a practical means for the enforcement of rights. All the statute does here is to give a more effective method for enjoyment of the right which the parties have by their own agreement created.

Turning to the argument that the act enlarges the jurisdiction of the admiralty courts by conferring upon them the equitable power of specific performance, it is to be observed that the Constitution has again left Congress free to make such improvements in admiralty procedure as it deems fit. The only constitutional limitation upon the the power of Congress to legislate in respect to admiralty is this: That it cannot extend the power of an admiralty court beyond that subject matter which was traditionally within the jurisdiction of admiralty—that is, it cannot under pretence of regulating the law of admiralty reach out and seize additional jurisdiction which the Constitution left exclusively with the states. But Congress may and frequently has modified admiralty procedure.

In the very early case of *The Propeller Genesee Chief* v. *Fitzhugh,* 12 How. 460, this court declared:

> "The power of Congress to change the mode of proceeding in this respect in its courts of admiralty, will, we suppose, hardly be questioned. The Constitution declares that the judicial power of the United States shall extend to 'all cases of admiralty and maritime jurisdiction.' But it does not direct that the court shall proceed according to ancient and established forms, or shall adopt any other form or mode of practice. The grant defines the subjects to which the jurisdiction may be extended by Congress. But the extent of the power as well as the mode of proceeding in which that jurisdiction is to be exercised, like the power and practice in all the other courts of the United States, are subject to the regulation of Congress, except where that power is limited by the terms of the Constitution, or by necessary implication from its language. In admiralty and maritime cases there is no such limitation as to the mode of proceeding, and Congress may therefore in cases of that description, give either party right of trial by jury, or modify the practice of the court in any other respect that it deems more conducive to the administration of justice."

Even changes in substantive admiralty law by Congress have received the full approval of the courts.

Southern Pacific Co. v. *Jaensen,* 244 U. S. 205, 215.

The Lottawanna, 21 Wall. 558.

The Gansfjord, 25 Fed. Rep. (2nd) 736, affirmed 32 Fed. (2nd) 236.

Stoffel v. *W. J. McCahan Sugar Refining & Molasses Co.,* 35 Fed. (2nd) 602, affirmed 41 Fed. (2nd) 651.

In the very case cited by the petitioner, *The Lottawanna, supra,* this court said:

> "But we must always remember that the court cannot make the law; it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the Legislative Department. It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress, undoubtedly, has authority under the commercial power, if no other, to introduce such changes as are likely to be needed. The scope of the maritime law, and that of commercial regulation are not coterminous, it is true, but the latter embraces much the largest portion of ground covered by the former. Under it Congress has regulated the registry enrollment, license and nationality of ships and vessels; the method of recording bills of sale and mortgages thereon; the rights and duties of seamen; the limitations of the responsibility of ship owners for the negligence and misconduct of their captains and crews; and many other things of a character truly maritime."

The citations given by the petitioner in support of the argument that Congress has no power to enlarge the jurisdiction of the admiralty court are in no way applicable to the statute now under review. The determination of the "true limits of maritime law and admiralty jurisdiction," which is "exclusively a judicial question" (Petitioner's Brief, p. 16) refers to the subject matter over which the federal courts are, by the Constitution, given jurisdiction. It does not in any way affect or concern the power of Congress to regulate the procedure of the federal courts in dealing with admiralty matters properly within their jurisdiction. Neither that decision nor any other cited by petitioner gives any support to its assertion that the practice and procedure of federal courts in admiralty must forever remain just as it was at the time of the Constitution, without regard for changing conditions or the demands of justice.

As a matter of fact, it is a misnomer to say that the statute directs the specific performance of the arbitration agreement. The term is convenient, but misleading. What the statute does under Section 4 is to provide that the court shall find whether a valid arbitration agreement exists, applicable to the disputes presented, and under Section 5 it is to aid the parties by the appointment of an arbitrator, if that becomes necessary. But no specific enforcement is granted in the ordinary sense that a recalcitrant party is forced to do something which he is unwilling to do. Even after an order of the court, he need not participate in the arbitration if he chooses not to. The court merely puts its stamp of approval upon the alleged obligation to arbitrate, and declares that an arbitration held pursuant to its terms shall be binding. No specific action on the part of the respondent is ever required. The formula of the statute that "the court shall make an order summarily directing the parties to proceed with the arbitration" is at variance with the legal effect of the order. A party is still at perfect liberty to refuse to appear before the arbitrators. He cannot be cited in contempt; he cannot be brought before the arbitrators unless by virtue of entirely independent process—a subpoena. An order in such an instance merely validates an *ex parte* proceeding before the arbitrators.

In this connection we call attention to Section 4-a of the New York statute, adopted by the New York legislature to correct the decision of the New York Court of Appeals in *Matter of Bullard* v. *Grace Co.*, 240 N. Y. 388, and to reinstate the original purpose of the act. The section was approved by the New York Court of Appeals in *Matter of Finsilver, Still & Moss* v. *Goldberg, Mass & Co.*, 253 N. Y. 382. If the agreement of the parties provides a means for setting up the arbitral tribunal without action of the parties themselves, *e. g.*, appointment of the arbitrators by another person or body, there is no need to resort to the court at all prior to the arbitration, but on a motion to confirm or vacate the award, the court may still

consider whether there was a duty to arbitrate. The proceeding under Section 4 of the act is merely a convenient means for the *advance* determination of the duty to arbitrate, but is not a necessary one.

POINT II.

The United States Arbitration Act is applicable to this case.

In Point VI of its brief, the petitioner argues that the jurisdiction of an admiralty court to enforce an arbitration agreement under the United States statute is limited to case involving foreign commerce, and that the present case involved intrastate commerce only. As authority for its first proposition it cites

Zip Manufacturing Co. v. *Pep Manufacturing Co.*, 44 Fed. (2nd) 184.

The Circuit Court of Appeals held that foreign commerce was involved in this case (p. 244). We shall not argue that question because it is not one which affects the general construction of the statute.

Assuming, however, that this court should disagree with the decision below, we submit that the construction of the United States statute urged by the petitioner and declared in the District Court in the *Zip* case, *supra*, is erroneous. We are not concerned here with the question whether the decision in the *Zip* case is right to the extent that it holds the act limited to commercial disputes and not applicable to patent disputes, but only with its broader decision that the act is limited by Sections 1 and 2 to agreements for arbitration of controversies arising out of foreign or interstate commerce or admiralty questions in foreign commerce.

The act rests upon two independent bases: first, the constitutional power of Congress to prescribe procedural mat-

ters for the federal courts, and secondly, the constitutional right to regulate matters of admiralty and interstate and foreign commerce. The two are independent. If a controversy is within the jurisdiction of the federal courts and if there was an agreement for arbitration thereof, it is to be enforced, whether or not it involves interstate or foreign commerce or a maritime transaction. This is clear from the provisions in the act itself, from its history, and from the report of the House Committee relating to the bill.

In the act as it was finally passed by Congress, Section 3 declares that *any* suit or proceeding brought in any federal court upon any issue referable to arbitration "under *an* agreement in writing for such arbitration" may be stayed. Under Section 4, a party aggrieved by a refusal to arbitrate "under *a* written agreement for arbitration" may petition any federal court "which, save for such agreement, *would have jurisdiction* under the judicial code of law, in equity, or in admiralty of the *subject-matter of a suit arising out of the controversy* between the parties" for an order directing arbitration to proceed. Under Section 7 arbitrators selected "either as prescribed in this act *or otherwise*" may subpoena witnesses. Under Section 8 "a cause of action *otherwise justiciable in admiralty*" entitles the party to bring his proceeding by libel, etc., and then to invoke the provisions of the act in respect to enforcement of the arbitration agreement and to have a decree entered on the award.

These sections, read without reference to Sections 1 and 2, would clearly indicate the purpose to prescribe rules of procedure for the federal courts applicable to any case where the federal jurisdiction would normally attach by reason of diversity of citizenship or otherwise.

It is suggested that doubt is thrown on this broad construction of the statute by reasons of Sections 1 and 2, which declare the validity, irrevocability, and enforceability of agreements "in any maritime transaction or a contract evidencing a transaction involving commerce,"

which terms, by definition, are limited to matters within admiralty jurisdiction and to interstate and foreign commerce. It is said that these two sections limit the whole act.

This construction is not reasonable, even on the face of the act itself. Of course, statutes are ordinarily to be read as a whole, and each section is to be interpreted with other sections in mind. But the result of limiting Sections 3 and 4 of this statute by Sections 1 and 2 leads to such results that it cannot have been the congressional purpose. It is necessary only to observe the practical operation of the narrow construction.

In New York and New Jersey, written agreements for arbitration are enforceable, whether they relate to intrastate or interstate commerce. Now, if an agreement concerning intrastate commerce is made between two residents of New York or two residents of New Jersey, it will be enforced in the state courts. The same agreement concerning interstate commerce will be enforced in the state courts. Or, in the latter case, a proceeding to enforce arbitration may probably be brought in the federal court, by virtue of Section 24 of the Judicial Code (U. S. Code, Title 28, Sec. 21), subdivisions (1) and (8), because it arises under the laws of the United States, and under a law regulating commerce, i. e., the United States Arbitration Act, and diversity of citizenship is not a prerequisite. If the agreement is between a citizen of New York and a citizen of New Jersey, and involves interstate commerce, it may still be enforced in either the New York, New Jersey or United States courts. But if it is between a citizen of New York and a citizen of New Jersey, but involves intrastate commerce only (*e. g.*, two corporations, both doing business in New York), then it is enforceable in the New York or New Jersey courts, but if it be removed to the federal court on the ground of diversity of citizenship, then the arbitration clause will be ineffective and unenforceable under this narrow construction of the act, because no interstate commerce is involved.

We suggest that Congress could have had no such intention. The statute is remedial and is entitled to a broad and liberal construction. It was passed upon the urgent and widespread demand of commercial interests and was intended to serve the purpose of those commercial interests. It was a part of a general national scheme for the furtherance of arbitration and is so to be construed as to supplement the state laws in matters of federal jurisdiction. The situation just discussed indicates the gap which would exist in the effectuation of the purpose behind the act if the narrow construction urged by the appellants were given to it.

Is it not unreasonable to say that Congress would have declared a new public policy relating to the enforcement of arbitration agreements, and yet would have drawn a line between that public policy as applied to interstate commerce and admiralty and as applied to identical intrastate disputes which came into the federal courts by reason of diversity of citizenship? Is it not even more unreasonable to suppose that Congress would have done this when the omission as to intrastate commerce would have offered a loophole to parties to escape from applicable state laws identical in principle with the federal law by removing the proceeding from the state to the federal court on the ground of diversity of citizenship? Lastly, since the statute is primarily a procedural one, is it not to be expected that it was so drawn as to effectuate the congressional power over procedure in the federal courts, and would it not be reasonable to expect that Sections 1 and 2, directed to interstate commerce and admiralty proceedings, were intended to extend the act rather than to limit it?

It may be argued that if the broader construction is given, and Sections 3 *et seq.* are construed to be directed to all cases otherwise within the jurisdiction of the federal courts, then Sections 1 and 2 would be wholly unnecessary and would be surplusage. This is not so. There is independent reason for Sections 1 and 2. The case supposed above concerns citizens of New York and New Jersey,

where there are modern arbitration statutes. Now assume a case arising between a citizen of Illinois and a citizen of Missouri, where clauses for the arbitration of future disputes are still unenforceable, involving interstate commerce, and a sum exceeding $3,000. Because of the diversity of citizenship, the case could be brought into the federal courts and the arbitration clause would be enforceable under the United States Act. But suppose that the case arose between two citizens of Illinois, but involved interstate commerce between Missouri and Illinois. Without Sections 1 and 2, it could not be brought into the federal courts at all, because there is no diversity of citizenship, nor would it arise under a law of the United States, or under a law regulating commerce. By inserting Sections 1 and 2, however, the act has extended the jurisdiction of the federal courts so that where interstate commerce disputes are concerned, the mere existence of an arbitration clause gives jurisdiction to the federal courts and thereby supplements the provisions of Section 3 *et seq.*, which provide for the enforcement of arbitration clauses where there is diversity of citizenship.

This is the construction of the act suggested by the Circuit Court of Appeals, Second Circuit, in

In Re Woerner, 31 Fed. (2nd) 283, 284.

The argument for the broad construction of the statute need not be rested solely upon the intention of Congress as spelled out from the provisions of the act itself. The record of congressional proceedings in connection with the passage to the act affords conclusive support for the broad construction.

In the *Zip Manufacturing* case, *supra*, the district judge concluded, on the strength of the amendments made in the Senate, that the act was limited to agreements in interstate commerce and admiralty. Apparently his attention was not called to the Committee hearings and to the House Committee report, which throw a wholly different light on the meaning of the statute.

We have already referred to the minutes of the Joint Hearing before the Subcommittees of the Committees on the Judiciary, 68th Congress, First Session on S. 1005 and H. R. 646, January 9, 1924, as printed for the use of the Committees on the Judiciary. A large number of proponents of the bill appeared at that hearing. The character of the bill as a general regulation of procedure in the federal courts was called to the Committees' attention. For instance, on page 17, Mr. Cohen was speaking of the defects under the common law, and the correction of these defects in New York by the New York statute. Then he said:

> "But it cannot be done under our constitutional form of government and cover the great fields of commerce until you gentlemen do it, *in the exercise of your power to confer jurisdiction on the federal courts. The theory on which you do this is that you have the right to tell the Federal courts how to proceed.* And you say to the judge: 'You used to hold that these things were not good; now they are good. You used to say you did not have jurisdiction; now you have jurisdiction.' That is all there is to it." (Italics ours.)

On page 30, speaking for the New Jersey State Chamber of Commerce, Mr. Vance said:

> "The reasons for endorsing a federal measure have been well put forward here, and I need not dwell upon them at length. But we are so enthusiastically in favor of it, that we feel that we can ask in a modest way the Congress *to extend this principle to the federal jurisdiction.*" (Italics ours.)

A brief prepared by the present counsel for *amici curiae* was also submitted to the sub-committees and is printed as part of the report. In it we said in part:

> "It has been suggested that the proposed law depends for its validity upon the exercise of the interstate-commerce and admiralty powers of Congress. *This is not the fact.*

"The statute as drawn establishes a procedure in the Federal courts for the enforcement of arbitration agreements. *It rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts.* So far as congressional acts relate to the procedure in the Federal courts, they are clearly within the congressional power. This principle is so evident and so firmly established that it cannot be seriously disputed.

"A federal statute providing for the enforcement of arbitration agreements *does relate solely to procedure of the Federal courts.*

* * * * * *

"So far as the present law declares simply *the policy of recognizing and enforcing arbitration agreements in the Federal courts* it does not encroach upon the province of the individual States. It seems probable, however, that Congress has ample power to declare [*in addition*] that all arbitration agreements connected with interstate commerce or admiralty transactions shall be recognized as valid and enforcible even by the State courts. In both cases the Federal power is supreme. Congress may act at its will, and having acted, no law or regulation of a State inconsistent with the congressional act can be given any force or effect even in the courts of the State itself. They are as much bound to carry out the provisions of such a Federal statute as though it was an act of their own legislature.

* * * * * *

"Even if, however, it should be held that Congress has no power to declare generally that in all contracts relating to interstate commerce arbitration agreements shall be valid, *the present statute is not materially affected.* The *primary* purpose of the statute is to make enforcible *in the Federal courts* such agreements for arbitration, *and for this purpose Congress rests solely upon its power to prescribe the jurisdiction and duties of the Federal courts*" (pp. 37-38). (Italics and bracketed matter ours.)

The House Committee on the Judiciary, supporting the bill, submitted a report to accompany it (Report No. 96, 68th Congress, First Session) in which they said in part:

> "The purpose of this bill is to make valid and enforceable, agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or admiralty, *or which may be the subject of litigation in the federal courts.* It was drafted by a committee of the American Bar Association and is sponsored by that Association and by a large number of trade bodies whose representatives appeared before the committee on the hearing. There was no opposition to the bill before the committee.
>
> "The matter is properly the subject of federal action. *Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought,* and not one of substantive law to be determined by the law of the forum in which the contract is made. *Before such contracts could be enforced in the federal courts, therefore, this law is essential.* The bill declares that such agreements shall be recognized and enforced by the courts of the United States. The remedy is founded *also* upon the federal control over interstate commerce and over admiralty. The control over interstate commerce reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce. * * *
>
> "In view of the strong support of commercial and legal bodies, the entire lack of opposition before the committee, the obvious justice of the result sought to be attained, and the evident propriety and necessity of federal action, we submit that the bill should become law. It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable." (Italics ours.)

The Senate Judiciary Committee in reporting out the bill proposed certain amendments. The following shows the material portions of the bill and the amendments made to them, the bracketed matter being omitted in the amendment and the italicized matter added:

"A BILL.

"To make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations.

* * * * * *

"SEC. 2. That a written provision in any [contract or] maritime transaction or *a contract evidencing a* transaction involving commerce to settle by arbitration a controversy thereafter arising [between the parties] out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

* * * * * *

"[SEC. 8. That if the basis of jurisdiction be diversity of citizenship between citizens of several States or one of the parties be a foreign State, citizen, or subject, the district court or courts which would have jurisdiction if the matter in controversy exceeded, exclusive of interest and costs, the sum or value of $3,000, shall have jurisdiction to proceed hereunder notwithstanding the amount in controversy is unascertained or is to be determined by arbitration.]"

The omission of the words "contract or" in Section 2, and the elimination of Section 8, could not have been intended to change the whole theory and basis of the act, and to exclude the procedural regulation of the federal courts to which the act had been primarily directed, and

limit it to interstate and foreign commerce and to admiralty in the field of foreign commerce. It should be said that these amendments were made in the Senate Judiciary Committee after the public hearings and without consultation with the sponsors of the bill.

It may well have seemed to the Senate Committee that the words "contract or" in the first line of Section 2 were needless and inappropriate. Obviously the congressional power generally to declare the validity and enforceability of arbitration agreements was limited to those fields where exclusive jurisdiction was conferred on Congress, such as interstate commerce and admiralty. And a general declaration that arbitration clauses in "any contract" should be valid might have seemed an attempt to invade the field reserved for the states. We believe, therefore, that the change was intended merely as an improvement in phraseology. If it had been intended to change the entire scope of the act, the Committee certainly would have eliminated the general term "contracts" as it appeared in the title and as it appears again in the second half of Section 2, "an agreement in writing to submit to arbitration an existing controversy arising out of such *contract*, transaction or refusal * * *."

So as to Section 8, the evident reason for eliminating it was the fear that cases brought into the federal court on the ground of diversity of citizenship might swamp the courts, if the $3,000 limitation was removed. But there is no evidence that it was thereby intended to cut out diversity of citizenship as a basis of jurisdiction when the jurisdictional amount was present.

That this was the understanding of the sponsors of the act is evident from the letter written by the chairman of the Committee on Commerce, Trade and Commercial Law to Senator Walsh (49 Reports of the American Bar Association, 1924, pp. 283-284). Mr. Piatt says in part:

> "The provision [as amended] in Sec. 2 * * * meets entirely with our concurrence and we think it is a considerable improvement in the language of the legislation. * * *

"Your suggestion that Section 8 be deleted so as to preserve the limitation on the jurisdiction of the federal courts, where the basis of jurisdiction is diversity of citizenship, namely, that the controversy shall involve, exclusive of interest and costs, the sum of $3000, seems to us to deprive the smaller claimants in arbitration cases of the opportunity to resort to the courts, which it would seem desirable they should have, as well as those involved in larger matters. We are, however, aware that there is considerable reluctance on the part of Congress to increase the jurisdiction of the federal courts, and if it be the view of your committee at this time that it is undesirable to include in the provisions, controversies involving less than $3000, we should be willing to approve of a limitation of $1000, and we trust that this will meet with your concurrence." (Bracketed matter ours.)

POINT III.

Section 8 of the act authorizes arbitration as part of a suit in admiralty, and authorizes the admiralty court to enter its decree upon the award without reference to the provisions of Section 9.

Section 8 of the act provides:

"If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award."

Section 9 provides that "if the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court," then an application may be made to that court for an order confirming the award.

The petitioner has argued in Points IV and V that Section 8 is applicable only to proceedings *in rem,* and that as there was no provision in the present arbitration clause for the entry of judgment on the award, as required by Section 9, there could be no confirmation under Section 8. We submit that the argument ignores the obvious purpose of Section 8.

The general theory of the federal and the state acts is that arbitration is a means for the settlement of disputes, alternative to litigation, and it is held that a party who commences an action thereby waives his right to arbitration. The result of this rule in the state courts has been that a party was denied the right to attach property as security for an award which might be rendered, or to commence proceedings to establish a mechanic's lien, etc. See, as an example, *Matter of Young* v. *Crescent Development Co.,* 240 N. Y. 244, 249. Section 8 was intended to preserve the right of a party to libel a vessel or other property without waiving his right to proceed under the arbitration clause. His right to arbitration was to be protected, but he would be able to secure the additional protection of the property seized.

It may be conceded that parties cannot take advantage of Section 8, unless they have a right to libel a vessel or other property. But we cannot believe that a serious argument is made that once a libel has issued or once there is jurisdiction *in rem,* the proceeding *in personam* must be separated—in effect—if advantage is to be taken of an arbitration agreement relating thereto. This would stultify the whole purpose of Section 8, which is to assure the party of his right to libel and then as part of, and incidental to, the admiralty proceeding to give him such right to arbitration as his agreement may provide. It is somewhat difficult to see how he would ever have an agreement for arbitration with the boat or other property libeled; the agreement must necessarily be with a party sued *in personam.*

But Section 8 is very clear in its declaration that when the admiralty proceeding has been commenced by libel, the arbitration is to be ordered as a part of the proceeding and the court "shall retain jurisdiction." Doubtless the provisions of Sections 4 to 7 and 10 to 11 are in most respects applicable to the subordinate arbitration proceeding which becomes a part of the main admiralty suit. But it does not alter the fact that under Section 8 the arbitration is within the confines of the admiralty suit and is not such an independent proceeding as that commenced under Section 4.

The point has not been expressly decided, but see expressions in:

The Volsinio, 32 Fed. (2nd) 357, 358; aff'd on an independent ground in *Ex Parte De Simone,* 36 Fed. (2nd) 773.

The Fredensbro, 18 Fed. (2nd) 983, 985.

Danielsen v. *Entre Rios Rys. Co.,* 22 Fed. (2nd) 326.

This analysis answers the further contention that the court could not enter its decree upon the award because there was no express agreement for the entry of judgment such as is required by Section 9. The act very clearly shows that the procedure under Section 8 and Section 9 are wholly different.

It is quite true that in the ordinary case parties who seek confirmation of an award must have agreed for the entry of judgment on the award before they can proceed under Section 9. The language is unfortunate. It is to be found in none of the state acts except in the provisions which have survived from the old New York statute. Undoubtedly it crept into the federal act through oversight. Nevertheless, it is there. But although it applies generally to the confirmation of awards, it is not applicable to proceedings under Section 8.

Where the ordinary arbitration agreement is concerned, a separate proceeding is brought to enforce it under Section 4. The enforcement is granted whether or not there is a provision for the entry of judgment. After the parties secure their award they must take steps to enforce it. If they have agreed for the entry of judgment, they do so by a summary motion to confirm; if not, then they must bring a separate action on the award in which the merits of the original dispute will not be reviewed, but the court will determine whether the award was properly rendered. Even if there was a pending action and that action was stayed under Section 3, the arbitration proceeding does not become a part of the action and within the jurisdiction of the court.

But Section 8 proceeds on a different theory. In substance, it treats the arbitration as if it were an arbitration under a rule of court in a pending action. The parties start the action and libel the property. Then they proceed to arbitration. The award is rendered. They are entitled to enforce the award by action, but the action is already pending. There is no need, then, to secure an order for confirmation because the appropriate procedure is to apply to the court which already has jurisdiction of the case, and under whose auspices the arbitration is held, for entry of a decree upon the award.

Doubtless the respondents in this case would have been more correct if they had moved for entry of a decree upon the award, rather than for "confirmation" thereof. But the record shows that they made their motion in the original action and "upon the pleadings and proceedings heretofore had," and that they asked for "such other and further relief," etc. (p. 167). The error, therefore, was merely a matter of terminology.

POINT IV.

An award by a majority of the arbitrators is sufficient.

The petitioner argues in its Point VIII that a unanimous award is necessary under the United States Act, and hence the present award is invalid because only four out of five of the arbitrators signed it.

Unlike the great majority of the modern arbitration statutes, the New Jersey and the Federal acts do not expressly provide that majority awards shall be valid. But it is common commercial practice that majority awards shall be recognized, and it is difficult to believe that unanimity was intended to be required by these statutes. Where the common practice prevails that each party shall nominate one arbitrator, who in turn select a third, there is very likely to be a dissent on the part of the arbitrator nominated by the losing party, and a requirement of unanimity would render abortive a large number of arbitrations. It is not likely that Congress adopted an act clearly intended to effectuate commercial demand, yet left a limitation which would materially impair its value.

We suggest that the answer in this case is to be found in the charter of the New York Produce Exchange, before one of whose committees the arbitration was held. The Produce Exchange was incorporated by Chapter 359 of the Laws of New York, 1862, under the name of "The New York Commercial Association." Section 5 of the statute provides for an Arbitration Committee and for the entry of judgment upon awards made by it, and Section 7 declares that "any number not less than a majority of all the members of the Arbitration Committee shall be competent to meet together to hear the proofs and allegations of the parties, and an award by a majority of those who shall have been present at the hearing of the proofs and allegations shall be deemed the award of the Arbitration Com-

mittee * * *." Hence three of the five members could conduct the proceeding and two of the three could make a binding award. Section 5 was amended by Chapter 291 of the Laws of New York, 1912, by which time the Association was known by its present name as the New York Produce Exchange. This amendment extended the power of the Committee so that it might hear arbitrations with non-members as well as members.

It is quite true that in this case the agreement was for arbitration not before the Arbitration Committee of the Produce Exchange, but before its Committee on Grain (p. 156). But the reason why the Grain Committee was chosen instead of the Arbitration Committee is fully set forth in the record (p. 205 *et seq.*). The Canal Carriers Association believed that the members of the Arbitration Committee were not experienced in these questions of grain shipments and wanted the Grain Committee to act because its members had the necessary experience. We suggest that the substitution of the Grain Committee for the Arbitration Committee was intended purely to affect the personnel of the arbitrators, and was not intended to make any change in their authority, and hence that it was the specific intention of the agreement that a majority award should be sufficient.

Leaving aside the special effect of the Produce Exchange charter in this case, it is unreasonable to suppose that Congress ever intended that a unanimous award should be required under the statute, unless there was a specific agreement therefor. The practical considerations under the statute and under the common law are strikingly different. When common law awards came before the courts they were the result of a formal submission of an existing dispute to arbitration. These submissions were usually instruments of some considerable detail. They prescribed the exact dispute between the parties. They named all the arbitrators. Frequently, if not usually, they prescribed certain elements of procedure for the arbitration. They contained provisions against revo-

cation and that the parties would abide by the award. With such formal agreements it was a simple matter for the parties to provide expressly for a majority award, if that was their purpose.

But under the statute, the practical connotations of the system are wholly different. It is not merely that brevity is now essential—brevity in a clause included in a larger contract and applicable to future disputes—"Dried Fruit Association arbitration," or similar provisions which are sufficient as between the parties to carry their entire meaning. The essential point to-day is that the law approves agreements for the arbitration of future disputes arising out of a contract; that the statute was passed to further the interests of the business world, to put the approval of the law upon their practices; and that business men insert these clauses providing for arbitration, knowing perfectly well what ordinary arbitration comprises, but not knowing the requirements of various statutes or special principles of law requiring special safeguarding clauses. Arbitration under the federal act will never be a successful and a practical system, if men are required to add express provision for majority award. Majority awards are the consistent practice of the business world; business men believe them to be one of the normal elements of arbitration. Congress could not have intended to leave such a serious gap in the effectuation of the act. If the construction for which the petitioner contends is given to the act, it will render abortive a large number of awards on a purely technical point—a point of which the complaining party never thinks until he has lost the case.

In this aspect, the practice and the rules of the common law ought not to control. We believe it the necessary conclusion from the circumstances under which the act was adopted that a majority award was intended to be valid.

CONCLUSION.

The decree of the lower court, upholding the validity of the award in this case, should be affirmed.

Dated, November 23, 1931.

Respectfully submitted,

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KENNETH DAYTON,
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BURTON A. ZORN,
with them on the brief.

SUPREME COURT OF THE UNITED STATES.

No. 172.—October Term, 1931.

Marine Transit Corporation and Tug "Gerald A. Fagan," by Marine Transit Corporation, Claimant, Petitioner, *vs.* Louis Louis Dreyfus and Charles Louis Dreyfus, etc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 4, 1932.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The petitioner, Marine Transit Corporation, entered into a written booking agreement with the respondents, Louis Dreyfus & Company, to furnish insurable canal tonnage for about 200,000 bushels of wheat, to be carried from Buffalo to New York. The contract provided that it should be "subject to New York Produce Exchange Canal Grain Charter Party No. 1 as amended". That charter party contained the following provision as to disputes:

"All disputes arising under this contract to be arbitrated before the Committee on Grain of the New York Produce Exchange whose decision shall be final and binding."

Under this contract, the Marine Transit Corporation, in September, 1928, provided the barge "Edward A. Ryan" to carry 19,200 bushels of the above-stated amount. This was a shipment, as the bill of lading of the Marine Transit Corporation shows, to the order of the Bank of Nova Scotia and was from Fort William, Ontario, 'in bond, for export', to be delivered 'on surrender of original Lake bill of lading properly endorsed'. While in tow of the petitioner's tug "Gerald A. Fagan" on the New York Barge Canal, and approaching the Federal lock at Troy, the "Edward A. Ryan" struck the guide wall and sank with its cargo. The respondents, Louis Dreyfus & Company, filed a libel in admiralty against the Marine Transit Corporation *in personam*,

and against the tug "Gerald A. Fagan" *in rem*, to recover damages for the loss of the wheat. The libel was also against a barge "John E. Enright", one of the boats in the tow, but the action as to that boat was subsequently discontinued. A claim for the tug "Gerald A. Fagan" was made by the Marine Transit Corporation and a stipulation for value was filed by it, as claimant, in the sum of $26,000, with the usual provision that the stipulation should be void if the claimant and the stipulator (the Continental Casualty Company) should abide by all orders of the court and pay the amount awarded by its final decree, and that otherwise the stipulation should remain in full force.

After answer to the libel had been filed by the Marine Transit Corporation as respondent, and as claimant of the tug "Gerald A. Fagan", the libellants moved for a reference of the dispute to arbitration in accordance with the provision of the booking contract. This motion was granted "only as to the issues raised by the contract between the libellants and the Marine Transit Corporation", and the latter was ordered to submit to arbitration as to these issues before the Committee on Grain of the New York Produce Exchange. The arbitration proceeded and resulted in an award against the Marine Transit Corporation for the sum of $23,016, with interest and the costs and expenses of the arbitration. The award was confirmed by the District Court and an order —in substance, a final decree—was entered for the recovery by the libellants against the Marine Transit Corporation of the amount of the award, with the further provision that if payment was not made within ten days, execution should issue against the Marine Transit Corporation and the stipulator. A motion to restrain the libellants from recovering from the claimant or its stipulator on behalf of the tug "Gerald A. Fagan" was denied. The decree entered upon the award was affirmed by the Circuit Court of Appeals (49 Fed. (2d) 215) and the case comes here on writ of certiorari.

There is no question that the controversy between the petitioner and the respondents was within the arbitration clause of the booking contract. That provision was valid (*Red Cross Line* v. *Atlantic Fruit Company*, 264 U. S. 109, 122), and, as it related to all disputes arising under the contract, it applied to the controversy with the Marine Transit Corporation as operating owner of the tug "Gerald A. Fagan" which was used for the agreed

transportation. The questions presented are (1) whether the action of the District Court was authorized by the United States Arbitration Act,[1] and (2) whether that Act, as thus applied, is constitutional.

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[1]Act of February 12, 1925, c. 213, 43 Stat. 883. The title of the Act and Sections 1 to 4, inclusive, and sections 6, 7, 8, a portion of section 9, and sections 13 and 14 are as follows:

"CHAP. 213.—An Act To make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That 'maritime transactions,' as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; 'commerce,' as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

"Sec. 2. That a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

"Sec. 3.. That if any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

"Sec. 4. That a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the

First. In construing the statute, we deal only with the questions raised by the present record. The loss occurred upon a waterway which was part of the navigable waters of the United States (*The Robert W. Parsons,* 191 U. S. 17) and while the cargo

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parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for the service of summons in the jurisdiction in which the proceeding is brought. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement: *Provided,* That the hearing and proceedings under such agreement shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

"Sec. 6. That any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

"Sec. 7. That the arbitrators selected either as prescribed in this Act or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, [illegible] majority of them, and shall be directed to the said person and [illegible] served in the same manner as subpoenas to appear and testify before [illegible] rt; if any person or persons so summoned to testify shall refuse or neglect to obey

was being transported by the petitioner under a maritime contract. The subject matter of the controversy thus lay within the jurisdiction of admiralty. The ambiguities of the statute have been stressed in argument, but we think that its provisions embrace a case such as the one before us[2] and it is not necessary to

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said summons, upon petition the United States court in and for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner now provided for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

"Sec. 8. That if the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

"Sec. 9. If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in the next two sections. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

. . . . . .

"Sec. 13. That the party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

"(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

"(b) The award.

"(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

"The judgment shall be docketed as if it was rendered in an action.

"The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

"Sec. 14. That this Act may be referred to as 'The United States Arbitration Act.'".

discuss others. Section 4 authorizes a court, which would otherwise have jurisdiction in admiralty 'of the subject matter of a suit arising out of the controversy between the parties' to a written agreement for arbitration, to 'make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.' Section 8 explicitly provides that where a cause of action is 'otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings,' and the court may then 'direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award'.

In this instance, the libel against the vessel came directly within the provision of section 8. But the petitioner insists that the District Court 'had no power under that section to make an order for arbitration of the proceeding against the Marine Transit Corporation, *in personam.*' Section 8, it is said, applies 'only to proceedings *in rem* or proceedings *in personam* where there has been an attachment of the property of the respondent', and there was no such attachment in this case. And it is contended that, aside from section 8, the Act does not provide for the granting of an order for arbitration 'in a pending suit.' With respect to the last contention, it may be observed that section 3 provides for a stay in a pending suit until arbitration has been had in accordance with the terms of the agreement, and it would be an anomaly if the court could grant such a stay and could not direct the arbitration to proceed, although the court, admittedly, could have made an order for the arbitration if no suit had been brought. We think that the petitioner's argument is based upon a misconception of

[2]The Committee on the Judiciary of the House of Representatives, in its report upon the bill, which with the Senate amendment became the Act in question, said:

"The purpose of this bill is to make valid and enforcible agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction of admiralty, or which may be the subject of litigation in the Federal courts. . . . The remedy is founded also upon the Federal control over interstate commerce and over admiralty." House Rep. No. 96, 68th Cong., 1st sess. See, also, Cong. Rec., vol. 66, pt. 3, 68th Cong., 2d sess., pp. 3003, 3004.

the statute. The intent of section 8 is to provide for the enforcement of the agreement for arbitration, without depriving the aggrieved party of his right, under the admiralty practice, to proceed against 'the vessel or other property' belonging to the other party to the agreement. The statutory provision does not contemplate 'the vessel or other property', which may be seized, as being the party to the arbitration agreement. By the express terms of section 8, the libel and seizure are authorized as an initial step in a proceeding to enforce the agreement for arbitration, and it is the parties to that agreement who may be directed to proceed with the arbitration. Here, the Marine Transit Corporation was the party to the arbitration agreement. It had used the tug as a facility for the transportation of the libellants' wheat, and the dispute as to liability was within the promise to arbitrate. If there was to be an order for arbitration, it would appropriately run against the Marine Transit Corporation to enforce that obligation. It was not necessary or proper that the order should run against the tug. Nor was it necessary that the court in directing the arbitration should attempt to split the proceeding with respect to the demand in the suit *in personam* against the corporation and that *in rem* against the tug. The Marine Transit Corporation was before the court both as respondent and as owner and claimant of the vessel seized, and the agreement to arbitrate bound the corporation in both capacities. We conclude that the order directing the arbitration of the issues arising under the contract between the libellants and the Marine Transit Corporation was authorized by the statute.

We do not conceive it to be open to question that, where the court has authority under the statute, as we find that it had in this case, to make an order for arbitration, the court also has authority to confirm the award or to set it aside for irregularity, fraud, *ultra vires* or other defect.[3] Upon the motion to confirm the award in this case, objections to the proceedings before the arbitrators were overruled by the District Court and are not pressed here. It is, however, urged against the award that it was signed by only four of the five arbitrators. The statute is silent with respect to a decision by a majority, but it does authorize action by a majority in compelling the attendance of witnesses

[3]See sections 10 to 12.

(section 7). In the absence of statutory requirement, the question as to the necessity of unanimity in the decision on the merits would be determined by the arbitration agreement, and it does not appear that under the agreement in this instance unanimity was needed. Nor does the record show that specific objection upon this point was taken in the District Court upon the motion for confirmation, and the rules of the New York Produce Exchange with respect to arbitrations under its Canal Grain Charter Party No. 1 (to which the petitioner's booking agreement was made subject) are not set forth. We think that there was no error in the ruling of the Circuit Court of Appeals upon this point.

The petitioner also insists that, under section 9, a judgment may be entered upon the award only if the parties have so agreed in their contract for arbitration and that the agreement here does not so provide. But the agreement for arbitration stipulated that the award should be 'final and binding'. The award was accordingly binding upon the Marine Transit Corporation both as respondent and as the owner and claimant of the tug, and the District Court entered its decree upon the award against that corporation under the authority expressly conferred by section 8.

The Circuit Court of Appeals also upheld the decree as against the stipulator, as its stipulation conformed to Admiralty Rule 8 of the Southern District of New York[4] and the decree was in accord with the stipulation and admiralty practice. *The Palmyra*, 12 Wheat. 1, 10; *The Wanata*, 95 U. S. 600, 611. We express no doubt as to the correctness of this conclusion, which the petitioner contests, but we have no occasion to deal with the question, as the stipulator has taken no steps to obtain a review of the decree in this Court.

We find no ground for disturbing the decree as unauthorized by the statute.

Second. The constitutional question raised by this application of the statute, is whether it is compatible with the maintenance of the judicial power of the United States as extended to cases of admiralty and maritime jurisdiction (Const. Art. III).

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[4]This rule is as follows: "Such stipulation shall contain the consent of the stipulators, that if the libellant or petitioner recover, the decree may be entered against them for an amount not exceeding the amount named in such stipulation and that thereupon execution may issue against their goods, chattels, lands, and tenements or other real estate.

In *Red Cross Line* v. *Atlantic Fruit Company, supra* (at pp. 122, 123), this Court pointed out that in admiralty 'agreements to submit controversies to arbitration are valid', and that 'reference of maritime controversies to arbitration has long been common practice'. 'An executory agreement', said the court, 'may be made a rule of court' and the 'substantive right created by an agreement to submit disputes to arbitration is recognized as a perfect obligation'. The question, then, is one merely as to the power of the Congress to afford a remedy in admiralty to enforce such an obligation. It was because the question was one of remedy only, that this Court decided that a State, by virtue of the clause saving to suitors 'the right of a common law remedy',[5] had the power 'to confer upon its courts the authority to compel parties within its jurisdiction to specifically perform an agreement for arbitration, which is valid by the general maritime law, as well as by the law of the State', and is contained in a maritime contract made within the State and there to be performed. *Red Cross Line* v. *Atlantic Fruit Company, supra,* at p. 124. The general power of the Congress to provide remedies in matters falling within the admiralty jurisdiction of the Federal courts, and to regulate their procedure, is indisputable. The petitioner contends that the Congress could not confer upon courts of admiralty the authority to grant specific performance. But it is well settled that the Congress, in providing appropriate means to enforce obligations cognizable in admiralty, may draw upon other systems. Thus the Congress may authorize a trial by jury in admiralty, as it has done in relation to certain cases arising on the Great Lakes.[6] Courts of admiralty may be empowered to grant injunctions, as in proceedings for limitation of liability.[7] Similarly, there can be no question of the power of Congress to authorize specific performance when that is an appropriate remedy in a matter within the admiralty jurisdiction. As Chief Justice Taney said in *The Genesee Chief,* 12 How. 443, 460: "The Constitution declares that the judicial power of the United States shall extend to 'all cases

[5]Judicial Code, sec. 24 (3); U. S. C., Tit. 28, sec. 41 (3).

[6]Act of February 26, 1845, c. 20, 5 Stat. 726; R. S. 566, U. S. C., Tit. 28, sec. 770; The Genesee Chief, 12 How. 443, 459, 460; The Eagle, 8 Wall. 15, 25.

[7]Hartford Accident & Indemnity Co. *v.* Southern Pacific Co., 273 U. S. 207, 218.

of admiralty and maritime jurisdiction'. But it does not direct that the court shall proceed according to ancient and established forms, or shall adopt any other form or mode of practice. . . In admiralty and maritime cases there is no such limitation as to the mode of proceeding, and Congress may therefore in cases of that description give either party right of trial by jury, or modify the practice of the court in any other respect that it deems more conducive to the administration of justice."

In this instance a remedy is provided to fit the agreement. The Congress has authorized the court to direct the parties to proceed to arbitration in accordance with a valid stipulation of a maritime contract, and to enter a decree upon the award found to be regular and within the terms of the agreement. We think that the objection on constitutional grounds is without merit.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.